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In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL G. TYSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, SECOND DISTRICT

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138 LP

QUESTIONS PRESENTED FOR REVIEW

I. Whether the prosecution's selection of the trial judge to preside over a criminal case violates a defendant's constitutional rights.

II. Whether the Sixth Amendment permits exclusion of bona fide, non-perjurious, disinterested defense witnesses with relevant factual information as a sanction for a good faith breach of a previously unannounced, and constitutionally questionable, discovery obligation.

III. Whether a defendant's Sixth Amendment rights are violated when relevant evidence demonstrating that the complaining witness had a motive to lie and countering the State's evidence of sexual innocence is excluded pursuant to a state rape shield statute.

IV. Whether a defendant has a Constitutional right to a jury instruction on a theory of the defense supported by facts and law.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT . . 18

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE PROSECUTION'S SELECTION OF THE TRIAL JUDGE TO PRESIDE OVER A CRIMINAL CASE VIOLATES A DEFENDANT'S CONSTITUTIONAL RIGHTS 18

II. CERTIORARI SHOULD BE GRANTED TO ANSWER SEVERAL IMPORTANT QUESTIONS LEFT UNANSWERED BY THIS COURT'S DECISION IN TAYLOR V. ILLINOIS 29

III. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED WHEN RELEVANT EVIDENCE DEMONSTRATING THAT THE COMPLAINING WITNESS HAD A MOTIVE TO LIE AND COUNTERING THE STATE'S EVIDENCE OF SEXUAL INNOCENCE IS EXCLUDED PURSUANT TO A STATE RAPE SHIELD STATUTE 38

VI. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO A JURY INSTRUCTION ON A THEORY OF THE DEFENSE SUPPORTED BY THE FACTS AND THE LAW 49

CONCLUSION 58

APPENDIX

Decision of the Court of Appeals of Indiana A-1

Order Denying Appellant's Petition to Transfer A-146

Decision of Chief Justice Shepard Explaining His Recusal . . . A-148

Indiana Code § 35-37-4-4 (Rape Shield Statute) A-167

TABLE OF AUTHORITIES

CASES

Allen v. Hardy,
478 U.S. 255 (1986) 27

Arizona v. Fulminante,
111 S.Ct. 1246 (1991) 23

Batson v. Kentucky,
476 U.S. 79 (1986) 24

Bouie v. City of Columbia,
378 U.S. 347 (1964) 44

Boyd v. State,
564 N.E.2d 519 (Ind. 1991) . 50,52

Chapman v. California,
386 U.S. 18 (1967) 23

Chambers v. Mississippi,
410 U.S. 284 (1973) 45

Commonwealth v. Schnopps,
383 Mass. 178,
417 N.E.2d 1213 (Mass. 1981) . 53

Commonwealth v. Stockhammer,
570 N.E.2d 992 (Mass. 1991) . . . 48

Davis v. Alaska,
415 U.S. 308 (1974) 45

Fendler v. Goldsmith,
728 F.2d 1181 (9th Cir. 1983) . 33

Goldberg v. Kelly,
397 U.S. 254 (1970) 28

Government of Virgin Island v. Jacobs,
634 F. Supp. 933 (D.V.I. 1986) . 48

Hill v. State,
517 N.E.2d 784 (Ind. 1988) . . 52

Howey v. State,
567 N.E.2d 1326 (Ind. 1990) . . 52

Laird v. Tatum,
409 U.S. 824 (1972) 22

Lewis v. State,
591 So.2d 922 (Fla. 1991) . . . 48

Liteky v. United States,
Docket No. 92-6921,
granting review of
973 F.2d 910 (11th Cir. 1992) . . 24

Marks v. United States,
430 U.S. 188 (1977) 44

Mathews v. United States,
485 U.S. 58 (1988) 54,57

McDonald v. Goldstein,
191 Misc. 863,
83 N.Y.S.2d 620, aff'd,
273 App. Div. 649,
79 N.Y.S.2d 690 (1948) 27

In re Murchison,
349 U.S. 133 (1955) 28

Olden v. Kentucky,
488 U.S. 227 (1988) 46

People v. Gilland,
110 A.D.2d 1078,
488 N.Y.S.2d 935 (1985) 48

People v. Sandoval,
135 Ill. 2d 159,
552 N.E.2d 726 (1990) 48

Phillips v. State,
550 N.E.2d 1290 (Ind. 1990) . . 33

Powers v. Ohio,
111 S.Ct. 1364 (1991) 24

Rock v. Arkansas,
483 U.S. 44 (1987) 32,46

Rose v. Mitchell,
443 U.S. 545 (1979) 28,29

Sandoval v. Acevedo,
996 F.2d 145 (7th Cir. 1993) . 48

State v. Calbero,
785 P.2d 157 (Haw. 1989) . . . 48

State v. Deptula,
31 Conn. App. 140,
623 A.2d 525 (1993) 53

State v. Hill,
744 P.2d 1228 (Kan. 1987) . . . 53

State v. Leonard,
513 A.2d 1352 (Me. 1986) . . . 48

State v. Roberts,
611 P.2d 1297 (Wash. App. 1980) 48

State v. Williams,
487 N.E.2d 560 (Ohio 1986) . . 48

Taque v. Richards,
1993 WL 328897 (7th Cir. 1993) . . 45

Taylor v. Illinois,
484 U.S. 400 (1988) . . . 16,29,30,
31,32
32,34,39

Tumey v. Ohio,
273 U.S. 510 (1972) 24

United States v. Brown,
539 F.2d 467 (5th Cir. 1976) . 27

United States v.
Columbia Broadcasting Sys.,
497 F.2d 107 (5th Cir. 1974) . 27

United States v. Gilboy,
162 F. Supp. 384
(M.D. Pa. 1958) 27

United States v. Lewis,
592 F.2d 1282 (5th Cir. 1979) . . 53

United States v. Nixon,
418 U.S. 683 (1974) 31

United States v. Sielaff,
615 F.2d 402 (7th Cir. 1979) . . . 56

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 24

Wardius v. Oregon,
412 U.S. 470 (1973) 32

Wealot v. Armontrout,
948 F.2d 497 (8th Cir. 1991) . 48

Whipple v. Duckworth,
957 F.2d 418 (7th Cir.),
cert. denied,
113 S. Ct. 218 (1992) 56,57

Williams v. Florida,
399 U.S. 78 (1970) 32,37

STATUTES

Ind. Code
§35-37-4-4 1,39,44

Ind. Code
§35-41-3-7 50

Ind. Code
§35-42-4-1 50

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Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,
77 Col. L. Rev. 1 (1977) . . . 47

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(Abridged 5th ed. 1983) 23

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27 Hous. L. Rev. 327 (1990) . . 31

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The Trial of St. Thomas More (1964) 26

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128 U. Pa. L. Rev. 554 (1980) . 41

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Const., Amdt. VI, provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, . . .

U. S. Const., Amdt. XIV, provides, in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Indiana Code § 35-37-4-4, Indiana's "Rape Shield Law," is set forth in the Appendix at A-167.

OPINIONS BELOW

The decision of the Court of Appeals of Indiana has been designated for publication, but has not yet been reported. It is reproduced in the Appendix at A-1. The Indiana Supreme Court entered an order, without opinion, dated September 22, 1993, denying transfer, which is reproduced in the Appendix at A-146. Chief Judge

Shepard's decision explaining the basis of his recusal is reproduced in the Appendix at A-148.

JURISDICTION OF THE COURT

This Court has jurisdiction to review the judgment of the Court of Appeals of Indiana pursuant to 28 U.S.C. §1257(a). The judgment of the Court of Appeals was entered on August 6, 1993. Petitioner timely filed a petition for transfer to the Supreme Court of Indiana. On September 22, 1993, the petition was denied.

STATEMENT OF THE CASE

Petitioner Michael G. Tyson was convicted of raping Desiree Washington at the Canterbury Hotel in Indianapolis, Indiana, on July 19, 1991. (R.1682-83)[1] The case was an exceedingly close one both at trial and

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[1] References to "R." are to the record of proceedings filed on the appeal to the Indiana Court of Appeals. References to "A" are to the Appendix to this Petition.

on appeal. The jury's initial vote was six to six. (R.25) The Indiana Court of Appeals affirmed two to one. (A-1) The Supreme Court of Indiana split two to two. (A-146)

In one sense, this case typifies some dangerous trends in current rape prosecutions. Defendant was hamstrung in his ability to present his defense by a process which was more concerned with the protection of a woman who claims she was the victim of rape than it was with the rights of a defendant who is accused of rape. This process, embraced by the trial judge, resulted in several rulings that ensured that the jury would decide the defendant's guilt or innocence without knowing all of the relevant facts and without considering both sides of the story. (R.1099, 4206, 1235, 1236, 5409-10)[2]

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[2] FBI statistics show that there are three times more "unfounded" claims of rape than false claims of any other

In another sense, though, this case is unique. The prosecutor enjoyed an unusual advantage from the very start of the proceedings. Indiana law and local practice gave the prosecutor the undisputed ability to pick the trial judge from among six criminal court judges in the county. He "selected" a judge who was a former sex crimes prosecutor. Defendant objected, before trial, inter alia, on Fourteenth Amendment grounds, but relief was denied.[3] The hand-picked trial judge

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offense. Uniform Crime Rep. Program, FBI, Crime in the United States: Uniform Crime Rep. (Compilation of Data from 1983-1991). Yet, it is precisely in the area of rape that the law -- at least in very recent years -- has developed in a direction that reduces the protections afforded a criminal defendant, and that restricts his ability to present his side of the story for the jury's consideration. The result, necessarily, is that more false claims of rape will result in convictions.

[3] Motion for Random Selection of Judge (R. 356); Memorandum in Support of Motion for Random Selection of Judge (R. 358).

proceeded to make a series of idiosyncratic, pro-prosecution rulings that deprived Petitioner of his rights to call witnesses in his own defense, to confront the witnesses against him, and to have the jury consider his defense. These rulings were upheld on appeal not as being necessarily "correct" but rather as being within the broad "discretion" of a trial judge, a judge who was selected by the prosecutor precisely so that she would make discretionary rulings in his favor.

Prior to trial, pursuant to the State's motion and Indiana law on discovery, the trial court entered discovery orders requiring the defendant to provide to the State, by a specified date before trial, the names, addresses, and statements of all witnesses he "intend[ed]" or "expect[ed]" to call. (R.198, 827,

494) This was a continuing obligation through trial. (R.199, 201)

During discovery, the defense learned that Washington's father had a violent temper and that he had attacked her upon learning of her romantic involvement with a boyfriend. (R.1048-49, 1053-54)[4] Before trial, the State sought an order in limine precluding the defense from introducing any evidence on this subject. Defendant opposed the motion on the ground that evidence about Washington's relationship with her father provided a

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[4] The particular facts relating to Washington's father were discussed in the briefs filed under seal with the Indiana courts. Although these facts have been widely publicized, in an excess of caution, because those briefs were sealed, we have not discussed the specifics in this Petition. The sealed brief of the Appellant filed in the Indiana Court of Appeals has been lodged with the Clerk of this Court, under seal. The relevant facts appear on pages 17-18. Petitioner has provided nine copies of those pages and has requested that a copy be provided to each Justice.

reason for her to cry rape falsely. (R.850) The defendant also moved separately for an order pursuant to Indiana's "rape shield" statute, IC 35-37-4-4, permitting him to refer to Washington's past sexual conduct, both to show how it had triggered her father's anger and provided a motive to lie, and to counter the false suggestion, advanced during Washington's grand jury testimony and expected at trial, that Washington was a sexual innocent who would never have consented to sex with the defendant. (R. 2922-31, 5413-14, 5497, 5415) In support, the defendant expressly raised his constitutional right to confront and cross-examine witnesses against him.[5] (R.849-50, 855-62) The trial

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[5] Memorandum in Support of Motion to Allow Reference to and Admission of Evidence of Complainant's Past Sexual Conduct at 1-2 (R.849-50) and at 7-9 (R. 855-57), citing United States Supreme Court cases.

court granted the State's, and denied the defendant's, motion. (R.1099, 1104)

Washington and Tyson were in Indianapolis for the city's Black Expo. Washington was competing for the Miss Black America title. She met Tyson at a rehearsal and made a date to see him that night. (R.3071) Several contestants testified that, after meeting Tyson, Washington commented on his wealth (R.4890), speculated on the size of his penis (R.5146-47), expressed the opinion that he lacked intelligence (R.4590, 4890-91), observed that his former wife had gotten a lot of money out of him (R.4590-91), and boasted that she, Washington, could have him too. (R.5147) Washington, however, denied having made any such comments. (R.3255-56) Tyson testified, and a witness who was present confirmed, that when he first met Washington, he bluntly told

her, "I want to fuck you." (R.5000, 5108-09) Washington denied this too. (R.3254)

That night, when Washington was already in bed, Tyson called her from his limousine. Washington agreed to meet him downstairs at approximately 1:40 am. She testified at trial, as she had in the grand jury, that when she climbed into the back seat of the limousine, Tyson kissed her, that she jumped back, and that he did not touch or attempt to touch her any more in the limousine. (R.3114-16) Tyson, however, testified that Washington not only returned his initial kiss, but that the two of them kissed and had other physical contact on the short drive to his hotel. (R.5018-19) Washington willingly accompanied Tyson to his hotel room, but testified that she did not hold Tyson's hand as they entered the hotel. (R.3116)

Washington testified that, in the hotel room, after some conversation, Tyson forced himself on her, over her vocal objections.[6] (R.3147) However, she also testified about things she said and did that were consistent with consensual sex acts. For example, she testified that she answered "yeah" when he asked her whether she wanted to be on top. (R.3153)

Tyson himself testified at trial,

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[6] Washington testified that she and Tyson were sitting on his bed talking when he said, "You're turning me on." (R.3125) According to Washington, she said she was not "like that" and went to the bathroom, telling him that she wanted to see Indianapolis when she came out. (R.3125) In the bathroom, she discovered that her menstrual period had begun. Nevertheless, (and showing that she expected to have intercourse), she discarded the protective panty liner she had been wearing, and made no attempt to improvise any sanitary protection. (R.3143, 3308-10, 3314) When she emerged from the bathroom, she claimed, Tyson was in his underwear and she became terrified. (R.3145-46) Nevertheless, she did not leave the room, nor return to the bathroom to use its telephone to call for help. (R.3509)

as he had in the grand jury, that Washington had willingly and enthusiastically engaged in sex with him, but had gotten annoyed when he declined her request that he walk her downstairs. (R.5022-26)

The case was essentially a credibility contest.[7] The trial court's "rape shield" rulings, however, rendered off-limits several avenues for attacking Washington's veracity and establishing her motive to lie.

Equally important, the jury never got to hear from three fact witnesses who had come forward during trial. They had witnessed Tyson's and Washington's arrival at the Canterbury, and had seen Washington and Tyson "all over each

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[7] The physician who examined Washington found no bruises or lacerations but did observe two small abrasions at the opening of her vagina. (R.3704-05, 3739, 3706-07) A defense expert testified that abrasions can and do occur as a result of consensual sex. (R.4680-83)

other" in the limousine, and holding hands as they entered Tyson's hotel. (R.1190-93) This testimony would have directly contradicted Washington's sworn testimony -- and corroborated Tyson's -- regarding the couple's consensual physical interaction immediately before the sex acts at issue.

On the first Thursday of the trial, an associate at the law firm of defendant's local counsel received a telephone call advising him that a woman had contacted Black Expo claiming to have information about the case. (R.1136, 1162) The associate spoke to the woman, Carla Martin, the following day, Friday, and learned that Martin and two friends had been at the Canterbury when Tyson and Washington arrived. (R.1163, 1190) Martin told the associate that she had seen Tyson and a young woman all over each other

in the back seat of the limousine, and that she had commented on this to her friend. (R.1190-91) The associate reported this to Tyson's trial attorneys, who questioned whether it was possible for anyone to see through the limousine's tinted windows from outside. (R.1163) They promptly secured an order allowing them to inspect the limousine, and discovered that one could see through the tinted glass. They interviewed two of the witnesses face to face the next day (Sunday) when the witnesses became available immediately after church. (R.1134, 1164, 4172) Finding them credible, the defense notified the prosecutor immediately, on Sunday afternoon. (R.1164)

The trial judge precluded the witnesses as a discovery sanction notwithstanding defendant's claim that he had Sixth Amendment and due process

rights to present witnesses in his defense[8] -- even though she found that the defense had not acted intentionally, purposefully, nor in bad faith. (R.4206, 4202, 4205)

The court also denied Tyson's timely requests that the jury be charged on the defenses of mistake of fact and/or reasonable belief as to consent, that is, that the jury should not convict if it found that Tyson reasonably believed that Washington had consented, even if he were mistaken about her consent. (R.1235, 1236, 5409-10) Indiana law at the time of the events at issue provided that mistake of fact is a defense to rape.

The defendant was convicted and sentenced to a term of six years' incarceration. (R.1682-83) He has

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[8] Motion for Leave to Name Additional Witnesses (R.1135, 1137-38); Motion for Reconsideration of Order Excluding Newly Discovered Witnesses. (R.1165)

been in prison since March 26, 1992. (R.1682)

On August 6, 1993, a three judge panel of the Court of Appeals affirmed the conviction, over the dissent of Judge Sullivan, who concluded that his "review of the entire record in the cause leads me to the inescapable conclusion that [the defendant] did not receive the requisite fairness which is essential to our system of criminal justice."[9] (A-106) All three judges agreed that Tyson was convicted under a judicial selection system that is "totally inappropriate and must be abandoned" because it "lacks the appearance of impartiality that is required to maintain the confidence of the public and the accused in the

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[9] Federal Constitutional claims were raised on appeal in connection with each of the issues raised here. Brief of Appellant Michael G. Tyson in the Court of Appeals, Points I, II, III, IV, VII.

system." (A-100-01) The court concluded, however, that there was "not enough to establish a violation of Tyson's right to due process." (A-98)

The majority upheld the preclusion of the defense witnesses, holding that the defense had not acted promptly enough in notifying the State of the witnesses' existence and deferring to the trial judge's discretion as to the appropriate sanction.[10] (A-6-25) No mention was made of the defendant's constitutional right to present witnesses in his favor, or of Taylor v.

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[10] The majority found a discovery breach only by articulating a new discovery obligation which was not set forth in any rule or order and which, Petitioner submits, is itself unconstitutional. The majority ruled that the defense's obligation to disclose was triggered when the associate in the office of local counsel for the defendant had spoken to two of the women and found them credible (A-21-22) -- even though the trial attorneys, for good reason, rejected the associate's judgment as to the witnesses' credibility and had not then decided to call them as witnesses.

Illinois, 484 U.S. 400 (1988), upon which defendant relied. The dissenting judge concluded that "there was no discovery order breach" (A-113) and that, even if there was some unexplained delay in disclosing the witnesses, witness preclusion was not appropriate in the absence of bad faith.

The majority also upheld the refusal to give instructions on the defense of reasonable belief and mistake of fact as to consent, again deferring to the trial judge's discretion. (A-65) The dissenting judge would have found this to be reversible error as well. (A-129) The court also refused to disturb the trial court's exclusionary rulings based on the rape shield statute. (A-52-53 & n.15)

On petition for transfer, the Supreme Court of Indiana split 2-2, the

Chief Justice having disqualified himself.[11] Under Indiana court rules, a tie vote results in a denial of further review. (A-146)

REASONS FOR GRANTING THE WRIT

I.
CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE PROSECUTION'S SELECTION OF THE TRIAL JUDGE TO PRESIDE OVER A CRIMINAL CASE VIOLATES A DEFENDANT'S CONSTITUTIONAL RIGHTS

All three judges of the Indiana Court of Appeals agreed that Tyson was convicted under a judicial selection

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[11] The Chief Justice recently disclosed that he disqualified himself because his wife, without identifying herself, had initiated a conversation with Petitioner's lead counsel, Alan M. Dershowitz, in which she had said that several Indiana lawyers had criticized an argument he had made for Tyson in the Court of Appeals in connection with an application for bail pending appeal. Although Dershowitz terminated the one-way conversation as soon as he learned who it was that was speaking to him, the Chief Justice ruled his recusal was necessary to avoid an appearance of impropriety inasmuch as his wife's comments to Tyson's attorney could have been construed as advice on how to handle the appeal. (A-148)

system that is "totally inappropriate and must be abandoned" because it "lacks the appearance of impartiality that is required to maintain the confidence of the public and the accused in the system." (A-100, 101, 106, n.34) Under this "totally inappropriate" system, a prosecutor in Marion County "control[s] the assignment of a case to a particular judge." (A-100-01)

The prosecutor here chose to exercise this extraordinary power and, in the words of the Indiana Court, "selected Judge Gifford as the presiding judge." (A-97) Incredibly, the Court of Appeals nonetheless concluded that because Tyson had not shown that Judge Gifford -- a former sex crimes prosecutor -- was specifically biased or prejudiced against him, there "was not enough to establish a violation of Tyson's right

to due process." (A-98)[12]

This case squarely presents a constitutional question that is of special importance to the administration of justice, but which has never been addressed by this Court: When a prosecutor hand-picks the judge who will preside over a criminal case, and also has the power to select or reject that judge in future cases, must a defendant show specific personal bias and prejudice to establish a violation of his rights to due process and a fair trial.

In holding that he must, the Indiana Court missed the essential

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[12] Ironically, the Chief Justice of the State, whose record suggests he probably would have voted in Tyson's favor, recused himself because of the action of his wife and his concern with the appearance of impropriety. (A-148) Surely, there was a far greater appearance -- and reality -- of impropriety in the prosecutor having "selected" the trial judge than in a brief one-way remark by the Chief Justice's wife to Tyson's lawyer.

wrong here. The vice of allowing the prosecutor to select the judge is not that he will pick a judge who is known to be biased or prejudiced against the particular defendant -- such a judge could be disqualified for cause. What is constitutionally impermissible about such a system is that it permits the prosecutor to select a judge who he believes will provide an advantage to the prosecution through the rendering of discretionary rulings.[13] Indeed, it

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[13] To use an analogy from baseball, assume that Nolan Ryan were pitching the seventh game of a World Series and that he tends to throw near the outside corner. Assume further that Ryan's team could select the home plate umpire, and that there was a choice between two excellent umpires, neither of whom was biased against Ryan but one of whom tended to call pitches close to the outside corner as strikes, whereas the other tended to exercise his discretion by calling them balls. It would be utterly unfair to allow Ryan's team to choose the excellent and unbiased official who would tend to rule in his favor in close cases. It is especially unfair if the umpire selected knew that Ryan's team would have the power to choose the umpire in important future games.

is precisely Judge Gifford's idiosyncratic discretionary rulings excluding relevant exculpatory evidence and rejecting critical defense theory instructions that provide independent constitutional questions for this Court's review. See Points II, III, and IV, infra.

All judges are not the same. As then Justice Rehnquist wrote in his memorandum opinion on recusal in Laird v. Tatum, 409 U.S. 824, 834-35 (1972):

> [T]he Justices of this Court, each seeking to resolve close and difficult questions of c o n s t i t u t i o n a l interpretation, do not reach identical results.
>
> * * *
>
> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial

> appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community." (quoting Justice Douglas in Chandler v. Judicial Council, 398 U.S. 74, 137 (1970)).

In an adversarial system, it must be presumed that a party with the power to choose a judge will choose a "biased" judge -- that is, one with an "inclination" his way.[14] And, as this Court has consistently recognized, a trial before a "biased" judge so undermines a defendant's right to a fair trial, it can never constitute harmless error. Arizona v. Fulminante, 111 S.Ct. 1246, 1254 (1991); Chapman v. California, 386 U.S. 18, 23 (1967).

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[14] Black's Law Dictionary (Abridged 5th ed. 1983) defines "bias" as:

> Inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction.

Indeed, when a defendant is tried before a judge with a financial interest in the outcome of the case, there must be a reversal "despite a lack of any indication that bias influenced the decision." Fulminante, 111 S.Ct. at 1257, citing Tumey v. Ohio, 273 U.S. 510, 535 (1927).[15] See also Ward v. Village of Monroeville, 409 U.S. 57 (1972) (petitioner denied fair trial when judge had financial interest in case without regard to whether the judge could be disqualified for bias or interest).[16]

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[15] See also Liteky v. United States, Docket No. 92-6921, granting review of 973 F.2d 910 (11th Cir. 1992).

[16] Similarly, a criminal defendant has a constitutionally-protected interest in neutral jury selection procedures, even absent a specific showing of bias or prejudice. Batson v. Kentucky, 476 U.S. 79, 87 (1986). See also Powers v. Ohio, 111 S.Ct. 1364, 1371 (1991) (discriminatory use of peremptory challenges "places the fairness of a criminal proceeding in doubt" regardless of whether the jurors dismissed were predisposed to favor the

Although Judge Gifford may have bore no ill will towards Tyson personally, the Indiana Court of Appeals documented numerous instances where she made discretionary rulings adversely affecting Tyson and favoring the prosecution. (A-6, 17, 24, 35, 40, 65) A divided Court then affirmed Tyson's conviction by deferring to these exercises of discretion made by a judge hand-picked by the prosecution precisely to secure these advantageous discretionary rulings.

Plainly, Judge Gifford's "discretion" affected the outcome of this case, as the prosecutor hoped and expected it would when he picked her. See Point II - IV, infra. Allowing a prosecutor to choose, from among all available judges, the judge whose "inclination" is to rule in the

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defendant). Surely, a defendant has an equally powerful interest in neutral judge selection procedures.

prosecutor's favor undoubtedly tilts the playing field even before the game has begun.[17] A defendant tried under such a system has been deprived of his rights to due process and to a fair trial even without a showing of personal bias or prejudice.

The wrong here was compounded by the fact that the prosecutor not only had the power to select the judge in this case, but also had the power to pick or reject that judge in future

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[17] It calls to mind the 1534 trial of St. Thomas More, and one of the primary criticisms of that trial: that the prosecution got to pick the judges.

> [F]or important cases a special commission of oyer and terminer was issued; the members of this temporary court were not all judges or lawyers, and it gave the crown an opportunity for selecting commissioners of the right colour. This packing of the bench was not regarded in those days as scandalous; it was just part of the order of things.

E.E. Reynolds, The Trial of St. Thomas More 71 (1964) (emphasis added).

high profile cases depending on how she performed in this one. "That a judge should ever be burdened with the thought that his assignments depended on the [prosecutor's] appraisal of his court work is unthinkable in American jurisprudence." McDonald v. Goldstein, 191 Misc. 863, 869, 83 N.Y.S.2d 620, 626, aff'd, 273 App. Div. 649, 79 N.Y.S.2d 690 (1948). The "unthinkable" happened to Tyson.

Neutral selection procedures are essential because anything less "may have some bearing on the truth finding function of a criminal trial."[18] Allen

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[18] As Justinian said more than a thousand years ago, "[i]mpartiality is the life of justice." United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976). "[A]n impartial judiciary has been basic to our concept of freedom ever since Magna Carta." United States v. Gilboy, 162 F.Supp. 384, 397 (M.D. Pa. 1958). "The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." United States v.

v. Hardy, 478 U.S. 255, 259 (1986). See also Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("an impartial decision maker is essential" to due process of law); Rose v. Mitchell, 443 U.S. 545 (1979). This Court has long recognized that:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.... Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."

In re Murchison, 349 U.S. 133, 136 (1955) (citations omitted).

When a practice "strikes at the fundamental values of our judicial

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Columbia Broadcasting Sys., 497 F.2d 107, 109 (5th Cir. 1974).

system and our society as a whole," the error must be corrected without "regard to prejudice" to the individual. Rose v. Mitchell, 443 U.S. at 556. This Court should grant review to make clear that a judicial selection process that offends all notions of fairness and that impugns the integrity of the entire criminal justice system deprives a defendant of his most basic constitutional rights.

II.

CERTIORARI SHOULD BE GRANTED TO ANSWER SEVERAL IMPORTANT QUESTIONS LEFT UNANSWERED BY THIS COURT'S DECISION IN TAYLOR v. ILLINOIS

Taylor v. Illinois, 484 U.S. 400 (1988), held that the Sixth Amendment's Compulsory Process Clause guarantees a defendant the right to present witnesses in his own defense. Taylor also held that the Sixth Amendment does not create an absolute bar to preclusion of defense witnesses as a

sanction for a deliberate violation of a discovery rule. Beyond that, however, Taylor left much unsettled. In fact, its dual holding itself created a vast area of uncertainty. One thing, however, is clear: This Court has never approved the exclusion of bona fide, non-perjurious, disinterested eyewitnesses for the defense with relevant factual information as a sanction for a good faith violation of a previously unannounced discovery rule. Exclusion under such circumstances seems clearly contrary to the spirit, if not the letter, of Taylor.

In Taylor, this Court upheld the exclusion of a defense witness where the defense had violated a discovery obligation in bad faith, and for a tactical advantage. The Court suggested that a balancing test should be employed to decide whether preclusion

was a permissible and appropriate response.

The Court did not specify whether the balancing test should be used only where the defense or defendant had acted intentionally and in bad faith, or whether it would apply across the board whenever a discovery breach occurred. Taylor also left unresolved the nature of the balancing process to be used, providing no guidance as to what factors must be weighed in the balance, or how much weight must be given to the defendant's constitutional right to present witnesses -- or to the adversary system's dependence on "full presentation of the facts, within the framework of the rules of evidence." See United States v. Nixon, 418 U.S. 683, 709 (1974).[19] Finally, Taylor did

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[19] The Court's failure to articulate standards has not gone uncriticized. See Comment, "Preclusion: Procedural Efficiency and the Right to Defend," 27 Hous. L. Rev. 327, 335

not address the type of discovery breaches which might be sanctionable by witness preclusion.[20]

Petitioner's case illustrates well the need for clarification of Taylor's balancing test. Exclusion was ordered by the trial court, and upheld by the appeals court, under analyses which did not even acknowledge that the defendant

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(1990).

[20] Criminal discovery, now common in the states, is a salutary development to minimize the risk that a judgment will be predicated on incomplete, misleading, or deliberately fabricated testimony. Williams v. Florida, 399 U.S. 78, 81-82 (1970); Wardius v. Oregon, 412 U.S. 470 (1973). Arguably, an intentional discovery breach may signal that the evidence the defendant seeks to introduce is not reliable; in such circumstances, the preclusion sanction furthers the purposes of the discovery rules. Where the discovery "breach" was not committed in bad faith, no presumption of unreliability can arise, and witness preclusion undermines the purposes the rules are designed to serve. See Rock v. Arkansas, 483 U.S. 44, 56 (1987) (restrictions on the right to present a defense "may not be arbitrary or disproportionate to the purposes they are designed to serve").

has a constitutional right to present witnesses in his own defense.[21] The only factor to which any weight was given was "prejudice to the State" -- the prosecutor having argued that having to deal with new witnesses would interfere with the "rhythm" of his presentation. (R.4182)[22] Surely, on a

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[21] See Fendler v. Goldsmith, 728 F.2d 1181 (9th Cir. 1983), cited with approval in Taylor.

Fendler held:

> "[F]or a balancing test to meet Sixth Amendment standards, it must begin with a presumption against exclusion of otherwise admissible defense evidence. No other approach adequately protects the right to present a defense. "

728 F.2d at 1188.

[22] Indeed, the Indiana courts did not even apply the test which they apply when the prosecution has violated a discovery duty, even though the State, unlike the defendant, has no Sixth Amendment rights. See Phillips v. State, 550 N.E.2d 1290, 1300 (Ind. 1990) ("exclusion of evidence is not proper absent a 'showing that the prosecution engaged in deliberate or other reprehensible conduct which

properly calibrated scale, this "prejudice" would not be substantial enough to overcome the defendant's right to present a defense, and the jury's entitlement to hear the relevant evidence before concluding guilt or innocence.[23] That is especially so where the trial prosecutor conceded that the information the new witnesses would present was "pivotal" (R.4192), and acknowledged,[24] "[w]e can have

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thwarted the defendant's right to a fair trial'"). Witness preclusion is never used as a discovery sanction in Indiana when it is the State which has been at fault.

[23] The State's attorneys had an opportunity to speak to the witnesses themselves, and could have requested a continuance if they needed additional time to prepare cross-examination or produce contrary witnesses. The State could also have recalled its witnesses before resting, or in rebuttal, if it thought that was necessary for a full presentation of the facts.

[24] There was no reason to think that the witnesses who came forward so late were the kind of eleventh hour witnesses whose testimony can be presumed perjurious. On the contrary, the record shows that the prosecutors,

little dispute with regard to what the testimony, if believed, could have in terms of an impact on [this] jury." (R.4186)[25]

The decision by the Court of Appeals raises an additional, important question: can criminal discovery obligations force counsel to choose between disclosing to the prosecutor potentially inculpatory witnesses

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after interviewing the witnesses, themselves concluded that they did actually witness Tyson and his companion arriving at the Canterbury Hotel. The prosecutors, however, believed that they were mistaken about the night and that they had actually seen Tyson arrive at the hotel the night before in the company of another woman. (R.1329) This is highly unlikely, since the witnesses had gone to the hotel after having attended the same concert Washington had attended before her late night date with Tyson. In any event, this was surely an issue which could be adequately explored through cross-examination or presentation of rebuttal evidence.

[25] On appeal, the prosecutor acknowledged that the excluded witnesses "clearly would be telling a story wholly different than the story we had." (A-118, emphasis added).

before counsel expeditiously checks the bona fides of the witnesses or risking the sanction of witness preclusion. As the dissenting judge concluded, it is impossible to identify anything that the defense did wrong or any discovery duty that it breached.[26] Tyson's lawyers took prompt steps to check out a lead that seemed likely to be just

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[26] The dissenting judge found no discovery violation and insisted that the defense had acted properly:

> Defense counsel had a duty to make reasonable investigation before seeking to add witnesses. Furthermore, for defense counsel to prematurely and without investigation advise the prosecution of witnesses who might well provide evidence against the defendant would be a breach of the ethical duty to one's client. Defense counsel is not required to, and may not ethically, assist the prosecution in its collection of evidence, case preparation, and trial presentation. Not only was there no discovery order breach, there was no delay, substantial or otherwise. (A-112-13)

another crank caller. (R.1136-37) The discovery orders in this case did not mandate any more. If the discovery orders are read -- as the Indiana courts read them -- to require that the defense disclose potential witnesses to the State even before deciding that it might call them and at a time when the defendant's trial lawyers did not believe that the witnesses were credible, those discovery obligations are themselves unconstitutional. They would force defense lawyers to take steps which could lead the prosecution to evidence against their client.[27]

Certiorari should be granted to answer these important questions created -- but left unanswered -- by this Court's decision in Taylor.

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[27] Under this Court's decisions, the obligation to disclose witnesses the defendant intends to call represents the outer limits of Constitutionally permissible discovery from the defendant. See Williams v. Florida, 399 U.S. 78 (1970).

III.

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED WHEN RELEVANT EVIDENCE DEMONSTRATING THAT THE COMPLAINING WITNESS HAD A MOTIVE TO LIE AND COUNTERING THE STATE'S EVIDENCE OF SEXUAL INNOCENCE IS EXCLUDED PURSUANT TO A STATE RAPE SHIELD STATUTE

Indiana, like nearly every state, as well as Congress,[28] has enacted a "rape shield" statute. See IC 35-37-4-4.[29] Indiana's statute also sets out a

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[28] For a comprehensive survey of the rape shield statutes in effect as of 1985, see Harriett R. Galvin, Shielding Rape Victims In The State And Federal Courts: A Proposal For the Second Decade, 70 Minn. L. Rev. 763 (1986).

[29] If the court finds it "material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value," a court may permit evidence:

> (1) of the victim's ... past sexual conduct with the defendant;
>
> (2) which in the specific instance of sexual activity shows that some person other

pre-trial procedure to be followed by a defendant who seeks to introduce evidence otherwise excluded by the statute. (A-167)[30] Carefully following this procedure, Tyson sought a ruling prior to trial on whether he could introduce evidence of Washington's prior sexual history. His offer of proof set forth two distinct reasons why such evidence was highly relevant in his particular case. (R.848-65, 1089-95)

> than the defendant committed the act upon which the prosecution is founded; or
>
> (3) that the victim's pregnancy at the time of trial was not caused by the defendant;

IC 35-37-4-4(b). (A-167)

[30] The defendant must "file a written motion not less than ten (10) days before trial stating that it has an offer of proof concerning evidence [it seeks to introduce] and its relevancy to the case. This motion shall be accompanied by an affidavit in which the offer of proof is stated." IC 35-37-4-4(c).

First, Washington's father had a temper and he had previously reacted violently upon learning that his daughter engaged in conduct of which he disapproved. (R.1048-49, 1053-54) See n.4, supra. Washington's parents were scheduled to arrive in Indianapolis the day after she had gone out with Tyson in the middle of the night. (R.3172-73) Washington's father was bound to find out, and Washington had every reason to fear her father's reaction to that news. She therefore had ample reason to concoct a story that would make her own conduct appear "blameless" in her father's eyes -- to fabricate a rape.[31]

Reading the rape shield statute

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[31] After Tyson filed his brief with the Court of Appeals, Tyson moved for a new trial based on newly discovered information that Washington had once before fabricated a rape charge to avoid her father's wrath. See Tyson's Second Verified Petition for Post-Conviction Relief, filed on February 20, 1995, presently pending before the Indiana Court of Appeals.

broadly and without even a mention of whether this evidence was relevant, the trial court ruled that evidence relating to Washington's relationship to her father was "prejudicial and should be excluded." (R.1099)[17]

Washington's sexual history was relevant for a second reason. During the grand jury proceedings, the prosecutor had tried to show that Washington was a sexual innocent. Fearing that the prosecutor would repeat this tactic at trial, Tyson sought to introduce evidence that would

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[17] The trial court was apparently referring to prejudice to the alleged victim because disclosure of the evidence would be embarrassing. Professors Tanford and Bocchino argue that this individualized concept of prejudice cannot outweigh a defendant's constitutional right to present relevant evidence -- that "adverse psychological effects suffered by crime victims, although regrettable, are not grounds for excluding probative evidence." J. Tanford & A. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544, 560 (1980).

counter the anticipated one-sided portrayal. (R.848-68, 1089-94) Again without any discussion of whether the evidence about Washington's sexual history would be relevant if the prosecutor first "opened the door" by suggesting Washington's sexual innocence, the trial court excluded the evidence. (R.1104)

As Tyson feared, at trial, Washington testified that she was a devout churchgoer who responded to Tyson's sexual innuendos by telling him that she "was not like these women you may have up here.... I'm not like that." (R.3059, 3125) The State, too, in its opening and closing, painted Washington as a paragon of innocence and virtue, as a good, Christian girl who would not have consented to sex with Mike Tyson. (R.2922-24, 2930-31, 5413-14, 5433, 5438, 5485, 5497) The State, knowing that Tyson's hands were

tied, went so far as to imply that Washington was a virgin when she arrived in Indianapolis, and, but for Tyson, would have returned home "the same girl." (R. 5415) Tyson could do nothing to counter this patently misleading picture.

On appeal, Tyson argued that excluding this highly relevant evidence on the basis of the rape shield statute infringed his Sixth Amendment right to confront witnesses and to present a defense. The Indiana Court of Appeals, without addressing either the relevancy of the evidence or the constitutional issues raised in Tyson's briefs, held that since the excluded evidence did not fall within one of the "strictly limited" exceptions to the Indiana rape shield statute, it was per se inadmissible. (A-53, n.15)[11] No

[11] Although the State did not argue waiver on appeal, the Indiana Appeals Court, announcing a new rule of state

Indiana court has ever held that the evidence Tyson sought to introduce was irrelevant to his defense. Nor has any court even weighed the prejudicial impact of that evidence against its

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with the relevant statute, and applying that new rule retroactively to Tyson's case, first held that Tyson's rape shield issues were not preserved for appellate review because Tyson had not sought to introduce the excluded evidence during the trial itself. (A-52-53) Tyson had scrupulously followed the procedure established by the Indiana legislature for pre-trial review of so-called "rape shield" issues. IC 35-37-4-4(c). He submitted a detailed offer of proof and an affidavit setting forth the evidence and explaining why it was material. (R.848-68, 1089-95) Nothing in the statute required that he renew his motion during the trial itself. Indeed, to require a defendant to seek leave to cross-examine a witness about her prior sexual history during the trial itself -- a public event which is often, as here, closely followed by the media -- conflicts with the very privacy interest the rape shield statute seeks to protect. Moreover, grafting such a requirement onto the rape shield statute and then applying it retroactively to Tyson would violate his due process rights and would not constitute an adequate, independent state ground. Marks v. United States, 430 U.S. 188 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964).

probative value. Instead, the Indiana courts have treated the question of relevancy as legally insignificant because the disputed evidence is inadmissible under the Indiana rape shield statute. In Indiana the law is now clear: the rape shield statute "trumps" the United States Constitution.[34]

The Indiana ruling conflicts with numerous decisions of this Court holding that state evidentiary rules "may not be applied mechanistically" so as to infringe on a defendant's right to cross-examine witnesses or present a defense. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).[35] And, while

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[34] The Court of Appeals for the Seventh Circuit has recently held that Indiana's rape shield statute is unconstitutional as applied. Tague v. Richards, 1993 WL 328897 (7th Cir. 1993).

[35] See also Davis v. Alaska, 415 U.S. 308 (1974) (juvenile shield law designed to protect juvenile's privacy interests could not justify

Sixth Amendment rights are not absolute and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," id. at 295, even otherwise legitimate restrictions on a defendant's right to cross-examine witnesses or present a defense "may not be arbitrary or disproportionate to the purposes they are designed to serve." Rock v. Arkansas, 483 U.S. at 56 (1987). The per se rule adopted by the Indiana courts -- that the state rape shield law renders inadmissible all evidence not covered by the three specific

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restrictions on defendant's right to probe possible sources of bias or motive); Olden v. Kentucky, 488 U.S. 227 (1988) (court could not exclude evidence of white woman's prior sexual history with black man, despite obvious potential for prejudice, when the excluded evidence was critical to claim that woman fabricated rape charge); Rock v. Arkansas, 483 U.S. 44 (1987) (state cannot exclude all hypnotically refreshed testimony by a defendant without regard to individual circumstances).

exceptions -- provides a classic example of a legitimate evidentiary restriction that has been applied in an arbitrary, disproportionate and ultimately unconstitutional fashion.

Rape shield statutes, no matter how salutary cannot, consistent with the Constitution, exclude evidence that would demonstrate that the alleged victim had a motive to lie, or that would counter the State's own efforts to paint a false "vision of ravished innocence." Vivian Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Col. L. Rev. 1, 16-17, 67 (1977).[36]

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[36] Evidence of prior sexual conduct may be particularly compelling in these two instances. Where motive is concerned, "the state's interest in shielding the victim, although substantial, cannot block a direct attack on her good faith, a challenge going to the very core of the accusation against the defendant." Berger, supra, at 67. And where the prosecutor has himself opened the door by offering evidence of sexual innocence, "he should not be allowed to

The hodgepodge of state and federal rape shield statutes has led to scores of confusing, inconsistent and often illogical rulings concerning the interplay between the evidentiary restrictions incorporated in a rape shield statute and the Sixth Amendment.[37]

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shut it in defendant's face." Id.

[37] Thus, some courts, unlike the Indiana courts, have held that a rape shield statute cannot operate to exclude evidence that reveals a motive to fabricate, see, e.g., Wealot v. Armontrout, 948 F.2d 497 (8th Cir. 1991); Lewis v. State, 591 So.2d 922 (Fla. 1991); Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991); State v. Roberts, 611 P.2d 1297 (Wash. App. 1980); People v. Gilland, 110 A.D.2d 1078, 488 N.Y.S.2d 935 (1985), or that would rebut specific evidence offered by the State of sexual innocence. State v. Calbero, 785 P.2d 157(Haw. 1989); Government of Virgin Island v. Jacobs, 634 F.Supp. 933 (D.V.I. 1986); State v. Williams, 487 N.E.2d 560 (Ohio 1986); State v. Leonard, 513 A.2d 1352 (Me. 1986). Other courts have applied the terms of their State's rape shield statute inflexibly as did the Indiana court here. See, e.g., People v. Sandoval, 135 Ill.2d 159, 552 N.E.2d 726 (1990). But see Sandoval v. Acevedo, 996 F.2d 145 (7th Cir. 1993) (holding that

This Court's intervention is necessary to provide guidance on the complex relationship between a defendant's Sixth Amendment right to a fair trial and a state's power to exclude a class of evidence for public policy reasons. This Court should grant review not only to correct the grave injustice done in this case, but to address this important and divisive constitutional issue.

IV.
CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A DEFENDANT HAS A CONSTITUTIONAL RIGHT TO A JURY INSTRUCTION ON A THEORY OF THE DEFENSE SUPPORTED BY THE FACTS AND THE LAW

Indiana has codified the common law defense of mistake of fact. By statute, "[i]t is a defense that the person who engaged in ... prohibited

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Illinois statute is unconstitutional when applied to exclude relevant evidence). See also discussion in Galvin, supra at 812-903, and cases cited therein.

conduct was reasonably mistaken about a matter of fact if the mistake negates the culpability required for the commission of the offense." IC 35-41-3-7. A mistake of fact that negates the level of culpability required for rape -- "knowing or intentional," IC 35-42-4-1 -- is a defense in a rape case. Boyd v. State, 564 N.E.2d 519 (Ind. 1991).

At trial, Tyson requested that the trial court instruct the jury on this defense, and on the related question of whether he had a reasonable belief that Washington had consented.[38] The State

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[38] Defendant's Proposed Instruction No. 6 read:

The defense of mistake of fact is defined by law as follows: It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for the commission of the offense. The reasonable mistake about a fact must have prevented the defendant from acting intentionally or knowingly as those terms are defined by law. In this case, it is a defense to all the charges that the defendant was

objected to both instructions on the ground that Indiana did not recognize a mistake of fact defense in a rape case. (R.1244-48). The trial court, presumably on this basis, refused the instructions. (R.1235, 1236, 5409-10).[39]

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reasonably mistaken about whether the complainant consented to the sexual acts in question. The State has the burden of disproving this defense beyond a reasonable doubt. (R.1236, 1237-42, 5381-86)

Defendant's Proposed Instruction No. 5 read:

Before you may return a conviction on any count, you must be satisfied that the State has proved beyond a reasonable doubt that the defendant knowingly forced the complainant to engage in the sexual acts charged. This means that the State must prove beyond a reasonable doubt that the complainant did not consent and, in addition, that the defendant did not reasonably believe that she had consented. (R.1235, 1237-42, 5381-86)

[39] The prosecutor asked if this meant that the defense could not argue in closing the defenses of "implied consent or mistake of fact." The court responded that the defense could argue the facts relating to those defenses because, in the court's words, "it was in evidence." (R. 5409, emphasis added) This was a crucial ruling, since, under

In the Court of Appeals, the State reversed its position entirely. It conceded that in Boyd v. State, 564 N.E.2d 519 (Ind. 1991), the Indiana Supreme Court had recognized the defense of mistake of fact in a rape case. Instead, the State argued that there was no evidence to support the tendered instructions.

The Court of Appeals majority, without considering whether the Constitution requires that the jury be charged on any defense theory that has some foundation in the evidence, and over a vehement dissent that characterized the majority's ruling as "impermissibly invad[ing] the jury's province" (A-135), held that, in light of Washington's testimony of non-

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Indiana law, counsel may not argue defenses that are not in evidence. See Howey v. State, 567 N.E.2d 1326 (Ind. 1990); Hill v. State, 517 N.E.2d 784, 7856 (Ind. 1988).

consent,[40] the jury could not have found that Tyson was reasonably mistaken about whether Washington had consented to sex. Based on this standard for determining when a defense theory instruction must be given, the majority concluded that Tyson had no right to the tendered instructions.[41]

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[40] This decision, therefore, conflicts with the rulings of other courts that, in deciding whether a defense instruction must be given, the evidence must be viewed in the light most favorable to the defendant and all reasonable inferences must be drawn in the defendant's favor. United States v. Lewis, 592 F.2d 1282 (5th Cir. 1979); State v. Deptula, 31 Conn. App. 140, 623 A.2d 525 (1993); State v. Hill, 744 P.2d 1228 (Kan. 1987); Commonwealth v. Schnopps, 383 Mass. 178, 417 N.E.2d 1213 (Mass. 1981).

[41] To reach its conclusion, the majority ignored the evidence demonstrating that, just moments before he entered the hotel room, Tyson had reason to believe, in the majority's own words, that Washington "would consent to sexual conduct in the future if the opportunity presented itself." (A-34-35) Under the majority's view, this evidence about Tyson's state of mind was irrelevant. The majority also ignored other evidence in the record that supported the defense instructions -- including

According to the majority, Tyson's primary defense was that Washington had actually consented to engage in sex; a defense the majority perceived as inconsistent with a defense based on a reasonable belief in or a mistake of fact about consent. Having chosen to defend on the one theory, Tyson was precluded from defending on the other. (A-75)

In Mathews v. United States, 485

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testimony of Reverend Catherine Newlin that Washington had described "some involvement" (R.4396-98) -- on the ground that it was not offered by a participant "to the events in the hotel room." (A-83) The dissent characterized the majority's refusal to acknowledge the admissibility of this evidence as "puzzling indeed." (A-111)

In fact, the two defenses are not inconsistent; they are uniquely compatible. A defendant can only testify as to his own perceptions of another person's state of mind. In a rape case, a defendant can only testify about whether the complainant appeared to consent, not whether she in fact consented. Thus, the very evidence that is probative of actual consent is probative of a reasonable belief in consent.

U.S. 58 (1988), which involved a defendant charged with a federal crime who denied commission of the crime but also sought an entrapment instruction, this Court held that a defendant has a right to an instruction on inconsistent defenses if there is "evidence sufficient for a reasonable jury to find in his favor." Id. at 63. The Court, however, did not identify the source of this right or explain what standards are to be used by the lower courts in deciding whether a defense theory instruction must be given. These remain unsettled and important constitutional questions. This case squarely presents both questions.

The decision of the Indiana court is also in direct conflict with a recent decision of the Seventh Circuit Court of Appeals that explicitly recognizes the constitutional source of a defendant's right to defense theory

instructions. In Whipple v. Duckworth, 957 F.2d 418, 420 (7th Cir.), cert. denied, 113 S.Ct. 218 (1992), the Seventh Circuit held that both the Fifth and Sixth Amendments require that a jury be instructed on any legal defense "which has some foundation in the evidence, [even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.'" Id. at 423, quoting United States v. Sielaff, 615 F.2d 402, 403 (7th Cir. 1979). As the Court explained:

> The Sixth Amendment, which assures the defendant of a right to trial by jury, is violated where the trial judge directs a verdict on an issue against the defendant. "[I]n the usual case evidentiary issues at the trial must include evaluation of the evidence supporting a proposed defense and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issues from the jury's consideration." ... Moreover, a Fifth Amendment violation occurs when the instructions provided do not "accurately [reflect] the law as it appeared at the time of the alleged criminal conduct."

Id. at 423 (citations omitted).

The Tyson decision cannot be reconciled with this Court's decision in Mathews, or with the constitutional standards announced by the Seventh Circuit in Whipple. This Court should grant review to resolve the conflict and finally settle if and when the Constitution requires that the jury be instructed on a legally supportable theory of the defense.

CONCLUSION

The importance of the constitutional issues presented, coupled with the fact that Petitioner was treated unfairly at every stage of the proceedings, warrants the granting of certiorari.

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IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

MICHAEL G. TYSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-9203-CR-129
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION NO. FOUR
The Honorable Patricia J. Gifford,
Judge
Cause No. 49G04-9109-CF-116245

SHIELDS, J.

Michael G. Tyson appeals his convictions of rape[1] and two counts of criminal deviate conduct,[2] all class B felonies.

We affirm.

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[1] See IC 35-42-4-1(1) (1992 Supp.).

[2] See IC 35-42-4-2(1) (1988).

ISSUES

Tyson raises issues for our review which we reorder and rephrase as:

1. Did the trial court err when it refused to grant Tyson leave to call witnesses for the defense who were not included on his list of witnesses?

2. Did the trial court err when it excluded evidence of alleged incidents between D.W. and her parents?

3. Did the trial court err when it excluded evidence of D.W.'s alleged prior sexual conduct?

4. Did the trial court err when it admitted an audio tape of D.W.'s call to 911, the emergency response number?

5. Did the trial court err when it allowed the State to read from Justice White's partial dissent in United States v. Wade during closing argument?

6. Did the trial court err when it rejected Tyson's tendered jury

instructions on the State's burden of proof and on mistake of fact?

7. Did the trial court err when it refused Tyson's tendered jury instruction on the jury's duty to accept the court's instructions as the law?

8. Did the manner by which the trial judge was selected violate Tyson's right to due process?

FACTS

Tyson was charged with rape, two counts of criminal deviate conduct, and confinement. The confinement charge was dismissed during trial; the jury convicted Tyson of the remaining charges.

Facts pertinent to the issues on appeal appear in the discussion of the particular issue.

DECISION

I.

Tyson argues the trial court erred when it refused to permit him to call as witnesses three women who came forward during the course of the trial.[4] The trial court did not abuse its discretion when it refused to allow the witnesses to testify.

A. Relevant Facts

Prior to trial, on December 11, 1991, the trial court granted the State's discovery motion and ordered that "the Defendant shall disclose to the State of Indiana the names,

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[3] Our resolution of each issue pertains to all three charges of which Tyson was convicted, although for clarity's sake, our discussion may center on only one of the convictions.

[4] The motions Tyson used to seek leave to call these witnesses were entitled Motion for Leave to Name Additional Witnesses and Motion for Reconsideration of Order Excluding Newly Discovered Witnesses.

addresses and phone numbers of all witnesses whose testimony will be relevant specifically to the issue of whether the victim consented to sexual intercourse with the Defendant, on or before December 18, 1991." Record at 493.

Voir dire began on Monday, January 27, 1992; the State began presenting its case on Thursday, January 30, 1992. In the afternoon of that same Thursday, and while the trial court was in session, a secretary from Black Expo contacted the law office of James Voyles, one of Tyson's trial attorneys, and told an associate, Mark Webb, that three women had come forward claiming to have information regarding the Tyson case. Webb spoke to one of the women by telephone midday Friday, and had a face-to-face interview with two of the women, Carla Martin and Pam Lawrence,

on Friday evening.[5]

On Friday evening, immediately after his interview with Martin and Lawrence, Webb met with Tyson's trial attorneys, Voyles and F. Lane Heard, III, and told them what he had learned. Voyles and Heard decided to inspect the limousine to determine whether Martin and Lawrence could have seen through the windows as they claimed. Tyson's counsel prepared a motion to produce

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[5] There is a conflict in the evidence concerning when Webb first made telephone contact with Martin and Lawrence. In his Motion for Leave to Name Additional Witnesses, filed Monday, February 3, 1992, Tyson states that Webb spoke to two of the potential witnesses by telephone Thursday night and then interviewed them at greater length on Friday. Record at 1136. At the hearing on this motion on Tuesday, February 4, Tyson's attorney stated that Webb contacted one of the witnesses around noon on Friday and conducted a face-to-face interview of Martin and Lawrence later that day. Id. at 4160. This same averment is repeated in Tyson's Motion for Reconsideration, id. at 1163, and in Webb's affidavit, attached as Exhibit A to Tyson's Motion for Reconsideration, id. at 1195-96.

the limousine and, after viewing it on Saturday evening, Voyles and Heard concluded that it was possible to see through the tinted windows. Voyles and Heard also decided personally to interview Martin and Lawrence, which they did at 2:00 p.m. on Sunday, February 2, 1992. After that interview, Voyles contacted Prosecutor Gregory Garrison at home and gave him the names, telephone numbers, and addresses of Martin and Lawrence, along with a summary of the information the women claimed to have. Later on Sunday afternoon, Voyles reached the third woman, Renee Neal, by telephone. Voyles promptly contacted Garrison with Neal's information. Representatives of the prosecution team met with the three women some time the next evening.

On Monday, February 3, 1992, Tyson filed the motion in which he sought

leave to call Martin, Lawrence, and Neal as witnesses. A hearing on the motion was held on Tuesday, February 4, after which the court denied the motion. The court also denied Tyson's Motion for Reconsideration, filed on February 7, 1992.

B. Waiver

The first inquiry is whether, as the State claims, Tyson failed to preserve this issue for review. An offer of proof is the method by which the proponent of evidence preserves any error in its exclusion. "When the proponent does not make an offer of proof, he has not adequately preserved the exclusion of [the] witness' [sic] testimony as an issue for appellate review." Wiseheart v. State (1986), Ind., 491 N.E.2d 985, 991 (citation omitted); see also Jones v. State (1988), Ind., 523 N.E.2d 750, 754. An

offer of proof provides the appellate court with the scope and effect of the area of inquiry and the proposed answers, in order that it may consider whether the trial court's ruling excluding the evidence was proper. Thus, the offer of proof must demonstrate the substance, purpose, relevancy, and materiality of the excluded evidence in order to enable the appellate court to determine on appeal whether the exclusion was proper. Strickland v. State (1977), 265 Ind. 664, 670, 359 N.E.2d 244, 249.

The State claims Tyson has waived the issue because his oral offer of proof given during the February 4, 1991, hearing contained only generalized statements of the women's testimony, while his written offer of proof was untimely. The State argues we should not consider the written offer

of proof because "it was not provided contemporaneously with the original motion or at the hearing where the exclusion was ordered" and "[s]hould this Court consider the late offer, the fairness and reciprocity upon which discovery is founded . . . requires consideration of the State's counter-offer of proof . . . when reviewing this issue." Appellee's Brief at 16.

The oral offer of proof is too general; however, the written offer provides a detailed summary of the testimony Tyson anticipated eliciting from Martin, Lawrence, and Neal had they been permitted to testify. Hence, the written offer is sufficiently specific to satisfy the requirements of an offer of proof. Furthermore, it is properly before us; the State's argument is untenable. Tyson's written

offer of proof was filed during his argument in support of his Motion for Reconsideration. Thus, it was available to the trial court when it ruled on that motion. On the other hand, the State's counter-offer of proof[6] was not available because it was not filed until March 25, 1992, well after the trial court had ruled and the trial had concluded. The issue of the trial court's exclusion of the testimony of

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[6] The State's counter-offer of proof asserts Martin would describe the limousine as black in color and would testify that the woman who exited from the backseat of the limousine was approximately "5'6" to 5'7" in height and was wearing a black mini-skirt and a top which had a collar," Record at 1327-28; that Lawrence would describe the limousine as black or burgundy in color and the driver as a white female with blond hair and testify that Martin asked her the identity of the male who exited the limousine's backseat; and that Neal would testify the limousine was white or gold in color and testify that she bumped into the male who exited from the backseat and "did not recognize him as the defendant because she knows what he looks like." Id. at 1329.

Martin, Lawrence, and Neal has not been waived.

C. Discussion

The trial court ordered disclosure of witnesses whom Tyson reasonably anticipated would testify by December 18, 1991. Necessarily, the names of Martin, Lawrence, and Neal could not have been disclosed by that date inasmuch as Tyson was unaware of their existence until January 30, 1992. However, two of the purposes of pretrial discovery are to promote justice and prevent unfair surprise. These purposes would be frustrated if there was not a continuing duty upon the parties to disclose the identity of newly discovered potential witnesses as soon as reasonably possible; a party could circumvent disclosure merely by failing to diligently discover potential witnesses until after

discovery was closed. Here, in an earlier discovery order, the trial court expressly imposed this duty. Record at 198, 201 ("[I]f the defense, after complying with the order to produce, finds either before or during trial additional information or facts which are subject to or covered by such order, defense counsel shall promptly notify the Court and the Prosecution of the existence thereof."). Thus, the issue here is whether Tyson violated his continuing duty to disclose the identity of the three women as soon as reasonably possible.

In Wiseheart v. State (1986), Ind., 491 N.E.2d 985, our supreme court outlined factors which are appropriate for a trial court to consider in determining its course of action when a party seeks to use the testimony of a witness whose identity is disclosed to

the opponent after discovery has been closed. These factors, paraphrased, include:

1. When did the witnesses first become known to opposing counsel?
2. How vital is the potential witnesses' testimony to the case of the proponent of the witness--is it relevant and material or merely cumulative?
3. What is the nature of the prejudice to the opponent--would permitting the witnesses to testify have a deleterious impact on the case prepared by the opponent?
4. Are less stringent alternatives appropriate and effective to protect the interest of the parties?
5. Will the opponent be unduly surprised and prejudiced by the inclusion of the witnesses'

> testimony despite the available and reasonable alternatives (e.g., a recess or a continuance) to allow the opponent to interview the witnesses and conduct further investigation, if necessary?

Id. at 991. On appeal, we apply an abuse of discretion standard; that is, "[a]bsent clear error and resulting prejudice, the trial court's determinations as to [discovery] violations and sanctions should not be overturned." Shumaker v. State (1988), Ind., 523 N.E.2d 1381, 1383. Based upon the Wiseheart factors, the trial court did not abuse its discretion in excluding the testimony of Martin, Lawrence, and Neal.[7]

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[7] The dissent attempts to characterize our review of the trial court's decision to exclude the testimony of Martin, Lawrence, and Neal as beyond that permissible for an appellate court. Specifically, the

dissent asserts that our review must focus on the discretion as it was exercised; that is, "we may not attribute to the trial court some legitimate but unexpressed reason" for its decision. Slip Opinion at 54. Our decision does, however, rest on the specific findings made by the trial court; we do not affirm based on unarticulated but legitimate reasons.

In any event, Palacios v. Kline (1991), Ind. App., 566 N.E.2d 573, and City of Elkhart v. Middleton (1976), Ind., 356 N.E.2d 207, the cases upon which the dissent relies to support its contention that this court's review is limited to the reasons expressed by the trial court, are distinguishable on several counts. For example, Palacios and City of Elkhart are civil cases that involve Ind.Trial Rule 15 amended and supplemental pleadings, Ind.Trial Rule 14(A) third-party practice, and Ind.Trial Rule 20(A) permissive joinder of parties issues. In addition, Palacios and City of Elkhart concern review of a trial court's exercise of discretion that was premised upon an incorrect legal standard. In contract, here the trial judge correctly determined that the proper legal standard is that found in Wiseheart. Finally, there are a multitude of criminal decisions which hold that a trial court's ruling admitting or excluding evidence may be upheld if there is any basis for the trial court's decision. See Feliciano v. State (1985), Ind., 477 N.E.2d 86, 88 (exclusion of evidence on hearsay grounds would be upheld if inadmissible

1. Diligence in Notifying the State

The trial began on Monday, January 27, 1992. The office of one of Tyson's trial attorneys was contacted and an associate, Mark Webb, was told about Martin and Neal on Thursday, January 30, 1992, the day the State began presenting its case-in-chief. The prosecution team was first notified of their existence, identity, and the nature of their testimony late in the afternoon on Sunday, February 2, 1992.

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on relevancy grounds); Hyde v. State (1983), Ind., 451 N.E.2d 648, 650 (if ruling admitting or excluding evidence was correct, no error will lie if trial court states erroneous reason for decision); Thurman v. State (1992), Ind. App., 602 N.E.2d 548, 553, trans. denied (erroneous conclusion by trial court that evidence was found in "plain view" and therefore admissible upheld since evidence was found in "open view" and would have been admissible under this exception to warrant requirement); Wright v. State (1992), Ind. App., 591 N.E.2d 1053, 1056, trans. denied (apparently unexplained decision excluding evidence upheld since evidence was merely cumulative).

Tyson argues the delay was unavoidable because members of the trial team met with the women as soon as possible and "[i]t is not, and cannot be, the law that the defense was obliged either to interview these witnesses earlier than it did or to reveal their existence before interviewing them, evaluating their credibility, and making a decision whether it would or might use them." Appellant's Brief at 30 (emphasis in original). This argument overlooks the fact that Webb, an attorney from defense counsel's law firm who had "assisted in various capacities in [the Tyson case] since it began and ... had various contacts with witnesses in [the] case during that time," Record at 1195, spoke by telephone with one of the women on Friday around noon, and interviewed Martin and Lawrence on

Friday evening before meeting with the trial team to apprise them of what he had learned. The trial court reasonably concluded that, at that point, the State should have been notified of the existence of the women and their potential testimony. Indeed, the record fails to reveal why Webb was unable to talk with Martin and Lawrence earlier or why he did not glean the necessary information from telephone interviews; Neal apparently was contacted only by telephone before the State was informed that she was a potential witness.

Trial counsel explains the delay between the time when Webb first learned of the proposed witnesses and when the trial team spoke with them, and the need for the trial team to personally investigate the proposed witnesses, by claiming that trial counsel on both sides had received

numerous crank calls from people claiming to have information about the case. This, however, does not explain why the judgment of Webb, who had been assigned to investigate such calls and who felt these witnesses were credible, was not sufficient to justify informing the State of the identity of the women and the subject of their anticipated testimony. It also does not explain why it was necessary for the trial team personally to inspect the limousine before notifying the State; Tyson was familiar with the limousine, and in fact testified that his plans to have sexual intercourse with D.W. in the limousine were thwarted because the partition was not sufficiently dark. Id. at 5070-71. In this respect, the trial court appropriately remarked that it could understand trial counsel's assiduity before trial, but was "a

little concerned about allowing a trial to proceed" while such diligent investigation took place. Id. at 4168.

While we, like the trial court, do not attribute blatant and deliberate misconduct or bad faith to Tyson's delay in advising the State of the Proposed witnesses' identity,[8] the

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[8] According to the dissent, the trial court necessarily erred in excluding the proffered testimony because the exclusion of evidence is appropriate only when a finding of blatant or deliberate misconduct or bad faith is made. However, with all due respect, the dissent is incorrect.

Judge Sullivan relies upon Jester v. State (1990), Ind., 551 N.E.2d 840, 842; Patel v. State (1989), Ind., 533 N.E.2d 580, 585; and Boyd v. State (1985), Ind., 485 N.E.2d 126, 127 to support his position that exclusion of evidence is appropriate only in the rare situation of blatant or deliberate misconduct or bad faith and, further, that the issue of an alleged discovery breach is waived in the absence of a request for a continuance. Taking these issues in reverse order, we agree that a request for a continuance is the predicate for preserving error by the unsuccessful opponent of proffered evidence. However, in the instant case, the dissent would require the State to

trial court did not abuse its discretion in determining the delay was excessive; Webb had interviewed Martin

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request a continuance after the trial court announced that it was going to exclude the testimony of Martin, Lawrence, and Neal, apparently to preserve the State's right to respond to Tyson's assertion of error. Logic alone established the incongruity of a position that would require the successful opponent of proffered evidence to request a continuance to preserve the right to defend the trial court's exercise of its discretion in its favor. It is impossible to envision a scenario where the opponent of proffered evidence who is successful in his or her efforts to have the evidence excluded would then ask for a continuance for the purpose of meeting the evidence that the trial court is going to exclude.

Further, there are circumstances other than the blatant and deliberate violation of a discovery order where exclusion of evidence is an appropriate exercise of judicial discretion. The error of Judge Sullivan's contrary position wan recognized recently by our supreme court: "[N]either our trial rules nor Indiana case law require evidence of bad faith an a prerequisite for excluding testimony." McCollough v. Archbold Ladder Co. (1993), Ind., 605 N.E.2d 175, 180-81 (citations omitted) (reversing the decision of this court which relied on Patel).

and Lawrence at some length and made a judgment regarding the relevance of the information they possessed and their credibility two days before the State was notified.

2. Nature of the Excluded Testimony

The second Wiseheart factor requires an examination of the nature of the excluded testimony.[9]

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[9] Tyson's written offer of proof, filed on February 8, 1992, in support of his Motion for Reconsideration, reads as follows:

If called to testify, it is anticipated that Carla J. Martin would testify as follows:

> Ms. Martin, along with Ms. Lawrence and Ms. Neal, attended the Johnny Gill concert at the Hoosier Dome on the night of July 18, 1991. Ms. Martin did so because she was the girlfriend of a man who was playing drums in Mr. Gill's band on that particular tour. Because Mr. Gill's band was staying in the Canterbury Hotel, Ms. Martin had changed her clothes on the day of the concert in a room in the Canterbury Hotel and left a bag with her belongings at the front desk.

After the concert ended sometime after 12:30 a.m. on July 19, Ms. Martin and her two companions went to the backstage area of the Hoosier Dome in which Mr. Gill's bus was parked. When Mr. Gill's band was fully packed onto the bus, Mr. Martin said good-bye to her boyfriend and she and her companions left the Hoosier Dome. They went to Mr. Lawrence's Nissan 300ZX.

With Ms. Lawrence driving, the three women proceeded to the Canterbury Hotel, in order to pick up Ms. Martin's belongings. Ms. Martin sat crammed behind her two friends in the two-seat sports car. They arrived at the hotel at approximately 1:30 to 1:40 a.m. They pulled their car up next to the curb, just beyond the entrance to the semi-circular driveway of the hotel. Ms. Martin went inside to retrieve her bag, and Ms. Neal also entered the hotel in order to make a phone call.

Ms. Martin got her bag, exited the hotel, and sat down in the front passenger seat (since Ms. Neal had not yet emerged from the hotel). As Ms. Martin sat there, a limousine pulled slowly into the semi-circular driveway. Ms. Martin looked at the limousine, was able to see through the tinted side windows in its backseat, and noticed a man and a woman hugging and kissing. Ms. Martin exclaimed to Ms. Lawrence

that the two people were all over each other.

Ms. Martin then observed that people began to exit the limousine. The woman exited first, from the passenger door facing the hotel, and stepped back so that her upper body was visible to Ms. Martin above the trunk portion of the limousine. Ms. Martin noticed that she was a black woman with shoulder-length curly hair. The second person to emerge from the limousine was a husky black man with large glasses; he exited from the front passenger seat of the limousine. Then, the driver of the limousine, who was a black female with tinted hair, exited; she began to walk around to the passenger side of the limousine. The man who had been kissing in the backseat then exited the limousine, and Ms. Martin immediately recognized him as Mike Tyson. She noted that fact to Ms. Lawrence. Ms. Martin observed the woman move toward Mr. Tyson until their upper bodies appeared to be touching, and she appeared to put her arm in Mr. Tyson's. Ms. Martin then observed Mr. Tyson and the woman enter the Canterbury Hotel, at about the same time that her third friend was leaving the hotel. Ms. Martin observed that Ms. Neal bumped into Mr. Tyson and the young woman.

* * *

If called to testify, it is anticipated that Carla J.

Martin [sic] would testify as follows:

Ms. Lawrence attended the Johnny Gill concert on July 18, 1991 at the Hoosier Dome, with Ms. Martin and Ms. Neal. After the concert ended at approximately 1 [sic] a.m. on July 19, Ms. Lawrence accompanied Ms. Martin and Ms. Neal to the backstage area of the Hoosier Dome where Mr. Gill's tour bus was parked. Ms. Lawrence watched Ms. Martin say good-bye to her boyfriend, who played the drums in Mr. Gill's band, and then she, Ms. Martin, and Ms. Neal walked to Ms. Lawrence's red Nissan 300ZX, which was in an adjacent parking lot.

Ms. Lawrence then drove her car, with Ms. Martin sitting behind the two seats and Ms. Neal sitting in the passenger seat, to the Canterbury Hotel. Ms. Lawrence pulled her car up to the curb in front of the Canterbury Hotel, just beyond the entrance to the hotel's semi-circular driveway. Ms. Martin entered the hotel to pick something up, and Ms. Neal went into the hotel to make a telephone call.

As Ms. Martin exited the hotel and returned to the car, a large limousine pulled into the hotel's driveway. Ms. Lawrence heard Ms. Martin remark that the two people in the limousine were all over one another; Ms. Lawrence looked over and saw two persons

sitting in the backseat of the limousine in close proximity to one another. One of the persons appeared to be a female with prominent hair.

Ms. Lawrence then observed a young black female emerge from the rear passenger-side door of the limousine. Ms. Lawrence observed that the woman had a prominent hair style of a kind not commonly seen among black women in Indiana. Then, Ms. Lawrence observed a black male exit from the rear passenger-side door of the limousine. Ms. Lawrence heard Ms. Martin say that the black male was Mike Tyson. Ms. Lawrence further observed a heavy-set black man in the vicinity of the limousine. Ms. Lawrence observed Mr. Tyson and the young black woman entered the hotel together.

* * *

If called to testify, it is anticipated that Renee Neal would testify as follows:

Ms. Neal accompanied Ms. Martin and Ms. Lawrence to the Johnny Gill concert at the Hoosier Dome on July 18, 1991. The three women left the Hoosier Dome at approximately 1:30 to 1:45 a.m. on July 19. They drove to the Canterbury Hotel in Ms. Lawrence's red sports car, and Ms. Neal entered the hotel to make a phone call.

As Ms. Neal stood in the

According to Tyson, "[i]f called to testify, it is anticipated that" Martin[10] would testify that Martin and

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> hotel parlor and made her call, she looked out the window and observed a gold limousine pull into the hotel's driveway. Ms. Neal observed that the limousine pulled up so close to the hotel that it appeared that it might come through the parlor window.
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> Ms. Neal then observed a black man and a thin black woman exit the limousine. As she was leaving the Canterbury Hotel, Ms. Neal observed the man and woman holding hands as they entered the hotel. Ms. Neal also observed a heavy-set black man with gold glasses standing near the limousine as she left the hotel and returned to Ms. Lawrence's car.

Record at 1189-93.

[10] The record is devoid of any affidavit, deposition, or testimony from Martin, Lawrence, or Neal; rather, the written offer of proof filed with Tyson's Motion for Reconsideration contained statements of counsel that, "If called to testify, it is anticipated that" Carla J. Martin, Pamela Lawrence, and Renee Neal would testify in a particular manner. Record at 1189, 1192. In fact, the offer of proof recites the anticipated testimony of an individual identified as Carla J.

Lawrence were in a car parked in front of the Canterbury Hotel at approximately 1:40 a.m. on July 19, 1991, waiting for a friend, Renee Neal. Record at 1189-90. While there, Martin observed a limousine pull in front of the hotel. Martin saw "a man and a woman hugging and kissing" in the backseat of the limousine. Id. at 1190. The offer further states that it is anticipated that Martin would testify that she then observed an African-American woman with

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Martin commencing on page 1 of the offer, Record at 1189; of an individual identified as Carla J. Martin commencing on page 3 of the offer, Record at 1191; and of an individual identified as Renee Neal at page 4 of the offer, Record at 1192. The assertion of Martin's anticipated testimony that appears at page 3 of the offer recites matters about which Martin could not have knowledge as, for example, statements about what Lawrence saw and heard and, accordingly, we conclude the identity of the second purported declarant is, indeed, Lawrence.

shoulder-length curly hair and Tyson, whom Martin immediately recognized, exit the backseat of the limousine and enter the hotel. As Tyson and the woman entered the hotel together, Martin saw Renee Neal, who was exiting the hotel, bump into the couple. Martin also observed that, as the couple entered the hotel, the woman "move[d] toward Mr. Tyson until their upper bodies appeared to be touching, and she appeared to put her arm in Mr. Tyson's." Id. at 1191. Martin also saw a husky African-American man with large glasses and an African-American woman with tinted hair exit the front of the limousine.

Tyson asserts that Lawrence, if called as a witness, would testify that she "saw two persons sitting in the backseat of the limousine in close proximity to one another." Id. at 1192.

In her opinion, "[o]ne of the persons appeared to be a female with prominent hair." Id. She observed Tyson and the woman enter the hotel together. Neal's testimony would be that she "observed the man and woman [who had exited a gold limousine] holding hands as they entered the hotel." Id. at 1193.

D.W., on the other hand, testified that Tyson hugged and kissed her when she got into the limousine at her hotel but no further physical contact occurred in the limousine, and that she walked into his hotel behind him, not arm-in-arm or holding hands. Tyson testified that they were "kissing and touching" as they were driven in the limousine to his hotel; he did not describe their conduct upon their arrival at his hotel or as they walked into his hotel. Id. at 5019.

The dissent argues the excluded

testimony "is different in kind and character from other evidence adduced at trial." Slip Opinion at 61. It makes this statement based upon the conclusion that "the manner in which Tyson and D.W. acted toward each other shortly before the acts complained of has extreme relevance to whether or not Tyson might have reasonably believed, from all the surrounding circumstances and events, that D.W. consented even though as a factual matter she did not consent." Id. at 64 (emphasis in original). We most strongly disagree. Even as the dissenter acknowledges that this review "is not about whether Michael Tyson raped D.W. and/or perpetrated two sexual deviate acts upon her," id. at 54, neither is this review about whether Michael Tyson at some point reasonably and honestly believed that D.W. would consent to

sexual conduct in the future if the opportunity presented itself. The evidence which the trial court excluded is relevant only to this non-issue. The record is replete with evidence from which a reasonable fact finder might reasonably conclude that Tyson had such a belief. However, an honest and reasonable belief that a member of the opposite sex will consent to sexual conduct at some point in the future is not a defense to rape or criminal deviate conduct. The only consent that is a defense is the consent that immediately precedes the sexual conduct; it is the defendant's honest and reasonable belief at that point in time, and not at any other point, that is relevant. Therefore, the trial court exercised sound discretion when it determined that the proffered testimony that Tyson and D.W. were "hugging and

kissing" in the limousine and that they walked into the hotel hand-in-hand or arm-in-arm was not vital. Instead, it is appropriate to classify that evidence, as the trial court did, as "in the nature of" cumulative evidence, because, as stated above, the record is replete with evidence from which Tyson might have formed an honest and reasonable belief that D.W. would consent to sexual conduct at some point in the future.

However, we also recognize that the anticipated testimony of Martin would have contradicted the testimony of D.W. that there was no physical contact between her and Tyson after the limousine left her hotel. Nevertheless, as impeaching evidence, the excluded testimony is cumulative;[11] D.W. was

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[11] In response to our discussion of the cumulativeness of the testimony of Martin, Lawrence, and Neal, the

dissenter, based upon the testimony of Reverend Katherine Newlin, claims that "the excluded evidence . . . thought by the majority to be cumulative, demonstrates that the jury was entitled to believe that there was consensual sexual contact in the hotel room. . . . At a very minimum [Newlin's] testimony gives rise to a strong and reasonable inference of consensual sexual contact in the hotel room. It is baffling indeed, therefore, that the majority proceeds to cavalierly discount the defendant's reasonable belief contention." Slip Opinion at 63. Indeed, we are baffled how the dissent draws its conclusion. Rev. Newlin testified:

> Q: [W]hat did [D.W.] tell you about the physical involvement that occurred between herself and Mr. Tyson?
>
> A: What I recall -- and again, it's not verbatim -- I recall that there was some involvement but it got to a point where she said and indicated no more, and she was communicating to me that that's when it continued on.
>
> Q: Did she tell you, Reverend Newlin, that there was physical involvement up to a point where she said no?
>
> A: Not specifically. There was some sense of

impeached on other points, including the details of the rape. For example, fellow Miss Black America pageant contestant Madeline Whittington testified that D.W. told her she was going out with Tyson and stated, "This is Mike Tyson. He's got a lot of money. He's dumb. You see what Robin Givens got out of him." Record at 4591. D.W. denied making these comments and several similar comments about which other witnesses testified. Id. at 3355, 3357-58. Pasha Oliver, one of D.W.'s roommates during the pageant and a hostile witness for Tyson, testified that D.W. told her Tyson restrained her during the rape by pinning her wrists together and covering her mouth with

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> participation, but she did not, as I recall, tell or communicate to me or did I hear in the room what that was or meant.

Record at 4398 (emphasis added).

his arm or hand, and that she asked Tyson to take her home after the rape and he refused, which made her angry. Id. at 5232. Again, D.W. expressly denied both of these things. Id. at 3323, 3356. Further, there was additional testimony that D.W. gave conflicting accounts of how the incidents in question occurred. See Appellant's Brief at 11-12 (summary of testimony of several pageant contestants regarding what D.W. told them about how the rape occurred).

In conclusion, the evidence of the conduct that occurred between Tyson and D.W. in the limousine before they entered the hotel and their conduct as they entered the hotel is not crucial considering the spectrum of evidence that corroborates the determination that Tyson reasonably and honestly believed D.W. would consent to sexual

conduct in the future and the spectrum of impeaching evidence that was admitted during the course of the trial, including D.W.'s inconsistent descriptions of the critical details of the conduct that occurred in Tyson's hotel room. Therefore, the trial court did not abuse its discretion in determining that the testimony of Martin, Lawrence, and Neal was not vital to Tyson's defense.

3. Remaining Wiseheart Factors

In weighing the remaining Wiseheart factors, the trial court properly considered that because Tyson first disclosed the existence and identity of Martin, Lawrence, and Neal near the conclusion of the State's case-in-chief, those witnesses known to the State who were in a position to confirm or deny their anticipated testimony, that is, D.W., the

Canterbury Hotel personnel, and the limousine driver, Virginia Foster, already had testified and been dismissed. The State asserts, "[o]bviously, had the State known before trial the substance of the new proposed witnesses' testimony, the prosecution would have restructured direct examination and secured additional witnesses to the facts alleged by the new witnesses." Appellee's Brief at 21. Presumably, contrary to Tyson's argument that the State would have had its witnesses lie, the State's argument is simply that the State would have been able to question its witnesses in its case-in-chief in more detail about such things as where Foster parked the limousine at Tyson's hotel, the lighting in the area, and whether there were other cars or people around. Instead, when Tyson

cross-examined D.W., the limousine driver, and personnel from the Canterbury Hotel, only he was aware of the existence and purported testimony of Lawrence, Martin, and Neal. Thus, Tyson was able to elicit testimony from these witnesses without the State being aware of the significance of the testimony. Furthermore, in anticipation of the testimony of Lawrence, Martin, and Neal, and in order to avoid contradicting them, Tyson may have refrained from propounding questions on cross-examination which he otherwise would have asked.

Also, because the written offer of proof was not submitted until after the State had rested its case-in-chief, if the witnesses in question had been permitted to testify the State would have had to recall its dismissed witnesses on rebuttal. The trial court

reasonably considered that the jury may not have accorded this evidence, presented on rebuttal, the same weight as it would have had it been presented during the State's case-in-chief.

The trial court also reasonably considered that, however limited the significance of their evidence might be, the anticipated testimony of Martin, Lawrence, and Neal would have required the State, in the exercise of "good lawyering," to identify, locate, and interview other witnesses, such as Martin's boyfriend, the drummer for Tyson's friend, Johnny Gill, and Tyson's girlfriend, Angela Boyd.[12] Then, arrangements would have had to be made to secure their testimony in

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[12] This additional investigation would have been necessary as a result of evidence that Tyson was present early on another morning with Angela Boyd in his limousine in front of his hotel.

person or by deposition. Of course, at that point, Tyson's counsel, also exercising "good lawyering," would also have needed to interview these witnesses. The trial court reasonably assumed that all of this effort to determine the accuracy of Martin, Lawrence, and Neal's recollection as to the date they observed Tyson and a woman in front of his hotel, and to determine the accuracy of the observations that Tyson and a woman were hugging and kissing and walking hand-in-hand or arm-in-arm, could have resulted in a delay of several days, or perhaps a week or more. In considering these final Wiseheart factors, the trial court also reasonably considered the fact that the jury in this case was sequestered for the duration of the trial and that the alternative to excluding the proffered evidence, a

continuance of several days and perhaps weeks, could have had an adverse impact upon the jury.

The circumstances of this case are closely analogous to those in Shumaker v. State (1988), Ind., 523 N.E.2d 1381, 1384. In Shumaker, the evidence "was largely cumulative of evidence offered by other defense witnesses regarding defendant's propensity for non-violence toward his wife." Id. Here, too, the evidence excluded would have been largely cumulative of other evidence impeaching D.W. and would have only corroborated Tyson's testimony that he believed D.W. would consent to sexual conduct at some future time, evidence that is irrelevant to the issue of whether she did in fact consent at the critical time. In Shumaker, our supreme court stated:

> While we agree that the extreme sanction of witness

> exclusion should rarely be imposed absent intentional concealment or substantial resulting prejudice, we cannot fault the trial judge for his imposition of the sanction in this case, given the nature and significance of the proposed testimony and the status of the trial at the time.

Id. Similarly, we conclude that we cannot fault the trial judge for excluding the anticipated testimony of Martin, Lawrence, and Neal, considering its nature and marginal relevance and the status of the trial at the time. There is no error.

II.

Tyson argues that the trial court erroneously excluded evidence regarding incidents between D.W. and her parents which allegedly would have shown that D.W. had a "powerful and secret motive" to fabricate the rape charge and would have exposed an alternative explanation for the psychological problems

experienced by D.W. following the subject incident. Appellant's Brief at 47. He contends that excluding this evidence violated his rights under the confrontation clause and his right to present a defense.

Prior to the trial, the State filed a motion in limine to prohibit Tyson from referring to incidents between D.W. and her parents, and any counseling D.W. received in connection with those incidents. Tyson, who had previously filed a motion to admit evidence of D.W.'s alleged prior sexual conduct and an offer of proof regarding the incidents, Record at 862-68, objected to the State's motion. Id. at 1047-65. The trial court granted the State's motion and the evidence of the incident was not offered during the trial.

A motion in limine serves to

prevent the display of prejudicial material to the jury until the trial court has the opportunity to make an evidentiary ruling within the trial context. Hadley v. State (1986), Ind., 496 N.E.2d 67, 71. It is a temporary order and requires a party to notify the court when he or she intends to offer the evidence excluded by the order. Davidson v. State (1982), Ind., 442 N.E.2d 1076, 1078. Merely challenging a trial court's ruling on a motion in limine fails to preserve any error for review. Tyra v. State (1987), Ind., 506 N.E.2d 1100, 1102; Johnson v. State (1985), Ind., 472 N.E.2d 892, 909. In order to raise the question of error, the information must be offered at trial to give the court an opportunity to determine its admissibility at that time. See Tyra, 506 N.E.2d at 1103; Bieghler v. State

(1985), Ind., 481 N.E.2d 78, 93, cert. denied, 475 U.S. 1031 (1986).[13]

As a defense witness, D.W.'s father, Donald Washington, was examined by trial counsel; D.W. and her mother, Mary Belle Washington, were fully cross-examined by trial counsel. Nevertheless, counsel failed either to seek leave to cross-examine D.W. and/or her mother on the subject-matter covered by the order in limine and/or to make an offer of proof during Tyson's direct examination of Donald

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[13] Tyson asserts that a "tiny portion" of the information was erroneously excluded under rape shield concerns. Appellant's Brief at 47; see IC 35-37-4-4 (1988). However, like all evidence excluded under an order in limine, Tyson had the obligation to attempt to present evidence implicating the rape shield concerns so as to challenge the motion and allow the trial court to rule on the admissibility of the evidence within the context of the trial itself. Trevino v. State (1981), Ind. App., 428 N.E.2d 263, 268. He did not do so and thus has failed to preserve any error for our review.

Washington. By not following either procedure, Tyson has failed to preserve any error. The issue is waived.[14]

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[14] Tyson raises three related points in his Reply Brief. First, he contends that the State is "estopped absolutely" from making a waiver argument because during the unrecorded conference regarding the State's motion in limine, Prosecutor Garrison "indicted that the issue was preserved for appellate purposes without it being revisited during the trial." Appellant's Reply brief at 21 (footnote omitted). This argument is without merit; the statement is a legal opinion upon which Tyson's counsel reasonably could not rely.

Second, he argues that his pre-trial offer of proof, pursuant to his IC 35-37-4-4 motion concerning the rape shield exception, was sufficient to preserve this issue for appeal. This is not correct. Only an offer of proof presented during trial preserves an error for our review. See Tyra, 506 N.E.2d at 1103.

Finally, although Judge Gifford granted a joint motion to file the original depositions of D.W. and her parents which allegedly contain references to the incidents, the depositions were neither offered nor admitted into evidence at trial. See Record at 1042, 1105; see also id. at 3092 (defense counsel Vincent Fuller stating during trial that D.W.'s deposition was not part of the record).

See Davidson, 442 N.E.2d at 1078.

III.

Tyson argues that the trial court erred by excluding all evidence of D.W.'s prior sexual conduct because the State "opened the door" by making "an all out effort to portray [D.W.] as a paragon of innocence and virtue . . . culminating in a suggestion . . . that [D.W.] had been a virgin when she arrived in Indianapolis." Appellant's Brief at 52. Prior to trial, Tyson filed a motion and supporting memorandum to allow reference to D.W.'s alleged prior sexual conduct if the State referred to D.W.'s adherence to Christian principles, her lack of sexual experience, or her lack of

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Thus, Tyson's citations to the "Dep. of [D.W.], Dec. 20-21, 1991, Defendants Ex. 12" and "Dep. of Mary Belle Washington, Dec. 6, 1991," Appellants Brief at 17, 52 n.59, items outside of the record, are unavailing.

receptiveness to sexual relations. Record at 849-64. The State opposed this motion and the trial court denied it. Id. at 1104.

Tyson claims that the State's examination of D.W., as well as its opening and closing arguments, left the jury with the impression that D.W. was a "sexual innocent whose religious beliefs prohibited any premarital sex and who was far too naive to understand the implications of going to Tyson's hotel room in the middle of the night," Appellant's Brief at 18, and he should have been able to challenge this impression by cross-examining her about her sexual history. However, again Tyson failed to preserve the pre-trial ruling by the trial court by asking leave of court to cross-examine D.W. on the subject, and thus this issue is not

before this court.[15]

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[15] Assuming that the error was properly preserved for review, the trial court did not abuse its discretion when it excluded evidence of D.W.'s alleged prior sexual conduct. Under IC 35-37-4-4, evidence of an alleged victim's sexual history is generally inadmissible in the trial of the alleged offender. Kelly v. State (1992), Ind. App., 586 N.E.2d 927, 929, trans. denied. The statute was enacted to prevent a general inquiry into the past sexual conduct of the victim in order to avoid "embarrassing the victim and subjecting her to possible public denigration." See Thomas v. State (1984), Ind., 471 N.E.2d 681, 683.

Tyson cites to portions of D.W.'s testimony which he asserts created an impression of innocence, including that she was active in her church, a doer of good deeds, and an award-winning student. He contends that the State's characterization of D.W. during opening and closing arguments as a "kid" with "eyes this big" who put on her "jammies" before bed and who expected to go home "the same girl" after her date with Tyson further enhanced this image. Appellant's brief at 19. Tyson argues he should have been permitted to impeach this "angelic image" by cross-examining her about her prior sexual conduct. Id.

Cross-examining D.W. about her prior sexual conduct in this case falls squarely within the terms of the rape shield statute. Assuming the testimony has some probative value in aid of the

IV.

Tyson argues that the trial court erred in admitting an audio tape of a telephone call that D.W. placed to 911 approximately twenty-four hours after Tyson raped her. He objected to the use of the tape because it was prejudicial and a prior statement inadmissible under Modesitt v. State (1991), Ind., 578 N.E.2d 649.

In Modesitt, our supreme court, adopting Fed. R. Evid. 801(d)(1)(B),

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theory that D.W. was not as sexually innocent as Tyson argues the State suggested, "the legislature has made the determination that evidence of prior sexual history, though arguably relevant to issues such as consent [or witness credibility], is not admissible except for three strictly limited purposes." Kelly, 586 N.E.2d at 929; see IC 35-37-4-4(b)(1), (2), & (3). The cross-examination testimony which Tyson wished to elicit does not fall into any of these three exceptions, and "we may not graft additional exceptions onto the statute." Kelly, 586 N.E.2d at 929. It was thus inadmissible under the rape shield statute, and properly excluded by the trial court.

held that

> a prior statement is admissible as substantive evidence only if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Id. at 653-54. Tyson correctly states that Modesitt and Rule 801 recognize that customarily a witness's prior consistent statement cannot corroborate her in-court testimony because, standing alone, a prior statement has little, if any, probative value. The State argues, however, that the tape is admissible under Modesitt because it rebuts the defense's allegations that D.W. fabricated her charge of rape and had improper motives in accusing Tyson.

The admitted tape is consistent with D.W.'s in-court testimony. It does

not contain any statements which rebut Tyson's allegation of fabrication or improper motive which were not obtained by direct or cross-examination. Thus, the tape contains merely cumulative evidence and its admission could, at most, constitute harmless error.[16] The admission of cumulative evidence is not prejudicial and by itself is not grounds for reversal. Miller v. State (1989), Ind., 541 N.E.2d 260, 262; see also McCollum v. State (1991), Ind., 582 N.E.2d 804, 812 (admission of audio tape containing cumulative information not sufficiently prejudicial as to require reversal); Hennings v. State (1989), Ind., 532 N.E.2d 614, 615 (any

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[16] The parties urge this court to interpret the term "recent fabrication," and offer a plethora of federal cases and cases from other states. However, because the erroneously admitted tape contained only cumulative evidence, we do not address any temporal requirement for admissibility.

error in admitting recording of victim's highly emotional call made immediately after rape was cumulative of victim's testimony and therefore harmless).

V.

During closing argument, the prosecutor read a passage from Justice White's partial dissent in United States v. Wade (1967), 388 U.S. 218, 256-57, in which Justice White expounds on the respective roles of defense counsel and the prosecutor in a criminal trial. When the prosecutor told the jury he was going to read from "a landmark case" from the United States Supreme Court, Tyson's counsel objected, stating, "Your Honor, I object to Mr. Garrison reading case law to the jury. I believe that's in the Court's province, not Mr. Garrison's." Record at 5500. The court overruled the

objection, and the prosecutor proceeded to read from Justice White's opinion at some length. On appeal, Tyson argues it was error to allow this passage to be read because it was "a prejudicial, irrelevant, and secretly edited[17]

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[17] Tyson's appellate counsel asserts that the prosecutor omitted a sentence from the passage he read, and claims that he "deliberately and secretly omit[ted] the most crucial sentence from the quoted paragraph" to Tyson's detriment. Appellant's Brief at 57. The prosecutor read the following passage:

> Law enforcement officers have the obligation to convict the guilty and to make sure that they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of a crime. To this extent our so-called adversary system is not adversary at all, nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but absent a

> voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. The defense counsel needs to present nothing, even if he knows what the truth is. He need not furnish any witness to the police or reveal any confidence of his client or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure, or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in worse [sic] possible light regardless of what he thinks or knows to be the truth. In this respect, as part of our modified adversary system and as part of the duty imposed upon honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relationship to the search for the truth.

Record at 5501-02. The sentence omitted by the prosecutor reads: "Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will

excerpt from Justice White's dated dissenting opinion, Appellant's Brief at 55 (footnote added), which "never was and is clearly not today the law," Appellant's Reply Brief at 26.

This issue is not properly before us for review for two reasons. First, Tyson objected only to the prosecutor reading case law in general; he did not make a specific objection to the particular case, that is, his only objection was made before counsel began reading from Wade, and thus could not have possibly addressed the substance of what was read. "The grounds for objection on appeal must be the same as those made at trial and any grounds not

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cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying." See Wade, 388 U.S. at 257. We are unclear how Tyson was prejudiced by the omission of this sentence which impugn the conduct of defense counsel.

raised in the trial court are not available on appeal." Fozzard v. State (1988), Ind., 518 N.E.2d 789, 792 (citation omitted); Wright v. State (1992), Ind., 593 N.E.2d 1192, 1194, cert. denied, 113 S. Ct. 605 (1992). While Tyson's trial counsel could not have been expected to be "a walking encyclopedia who had committed the Wade opinion to memory, so that he could instantly know that the prosecutor not only misstated when he said he was reading from the 'law,' and from a 'concurring opinion,' . . . but also know that the State was editing out key portions of the excerpt," Appellant's Reply Brief at 27, it is reasonable to expect counsel to make a specific objection after it was apparent, by inquiry if necessary, from which case the prosecutor was reading. In particular, counsel may be expected to

listen to what is read and object if he or she feels it is prejudicial to his or her client. Thus, Tyson's failure to object to the reading from Wade in particular, rather than to the reading of law, in general, constitutes waiver of this issue.[18]

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[18] In addition to making an insufficient objection, Tyson failed to properly preserve this issue because he failed to ask for an admonition and mistrial.

> [W]hen an improper argument is alleged to have been made the correct procedure is to request the trial court to admonish the jury. If the party is not satisfied with the admonishment, the correct procedure is to make a motion for a mistrial. Failure to request an admonishment or move for a mistrial results in waiver of the issue of improper argument.

Brewer v. State (1993), Ind., 605 N.E.2d 181, 182 (citations omitted); see also Dresser v. State (1983), Ind., 454 N.E.2d 406, 407.

Tyson's appellate counsel argues that trial counsel did not request an admonishment or mistrial because to do so after the court had overruled his

VI.

Tyson argues the trial court committed reversible error when it refused to give his Tendered Instructions Nos. 5 and 6, both of which deal with Tyson's belief regarding D.W.'s consent to sexual acts. The instructions in question read as follow:

Tendered Instruction No. 5:

Before you may return a

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objection "would have been to become a 'chattering magpie.'" Appellant's Reply Brief at 27 (citing United States v. Kelinson (1953), 2d Cir., 205 F.2d 600, 602). The Indiana supreme court rejected this argument in Dresser, 454 N.E.2d at 407 ("We acknowledge that the court overruled the objections that were made, which strongly indicates that such motions [for admonishment and mistrial] addressed to the objections would also have been overruled. Nevertheless, the objections made and rulings thereon preserved nothing for appellate review."), and reaffirmed its position just this year in Brewer, 605 N.E.2d at 182-83 (failure to move for admonishment or mistrial waived issue of alleged improper use of Wade opinion in closing argument, even though appellant's objection was overruled).

conviction on any count, you must be satisfied that the State has proved beyond a reasonable doubt that the defendant knowingly forced the complainant to engage in the sexual acts charged. This means that the State must prove beyond a reasonable doubt that the complainant did not consent and, in addition, that the defendant did not reasonably believe that she had consented.

Tendered Instruction No. 6:

The defense of mistake of fact is defined by law as follows: It is a defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for the commission of the offense. The reasonable mistake about a fact must have prevented the defendant from acting intentionally or knowingly as those terms are defined by law. In this case, it is a defense to all the charges that the defendant was reasonably mistaken about whether the complainant consented to the sexual acts in question. The State has the burden of disproving this defense beyond a reasonable doubt.

Record at 1235-36. Although we

recognize the implicit differences between "reasonable belief" and the "defense" of mistake of fact, we consider the tendered instructions together because, as Tyson notes, "[f]or purposes of this case, there is no significant difference between the defenses of mistake of fact and reasonable belief as to consent. Both require the defendant reasonably believe the complainant consented to sex." Appellant's Brief at 39 n.41.

Jury instructions lie largely within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Woods v. State (1992), Ind. App., 587 N.E.2d 718, 722, trans. denied; Crabtree v. State (1989), Ind. App., 547 N.E.2d 286, 292, trans. denied. When the trial court refuses to give an instruction, we must determine whether the tendered

instruction correctly states the law, whether there is evidence in the record to support the giving of the instruction, and whether the substance of the tendered instruction is covered by instructions which were given by the trial court. Crabtree, 547 N.E.2d at 292; see also Aschliman v. State (1992), Ind., 589 N.E.2d 1160, 1162.

Assuming that Tendered Instructions Nos. 5 and 6 correctly state the law in Indiana,[19] the

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[19] Although not argued by the State on appeal, a credible argument can be made that the tendered instructions do not correctly state the law in Indiana because they incorrectly focus on Tyson's perception of D.W.'s consent.

The culpability required for the commission of an offense is defined in IC 35-41-2-2(d) (1988) which provides: "Unless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct." Thus, unlike the Model Penal Code, which requires culpability with

respect to every material element of the offense, the Indiana Criminal Code requires culpability only with respect to the prohibited conduct. Compare Rose v. State (1982), Ind. App., 431 N.E.2d 521, 524 n.1 and Markley v. State (1981), Ind. App., 421 N.E.2d 20, 21 with Model Penal Code § 2.02(4) (1962) ("When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears."). This distinction was emphasized by the amendment to the culpability statute which occurred in 1977. A prior version of IC 35-41-2-2(d) required culpability with respect to material elements of "prohibited conduct and its attendant circumstances." IC 35-41-2-2(d) (1976). By deleting the phrase "and its attendant circumstances," the legislature expressed its intent to limit the culpability requirement to prohibited conduct only. Markley, 421 N.E.2d at 21 ("If the legislature had intended culpability to apply to every material element, the phrase 'of the prohibited conduct' would be superfluous.").

The significance of the fact that culpability is not required for attendant circumstances is illustrated by the statutory definition of the mistake of fact defense. IC 35-41-3-7 (1988) defines the defense as follows: "It is a defense that the person who

engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense." (emphasis added). Thus, an alleged mistake of fact with reference to an attendant circumstance for which there is no culpability required is not within the parameters of the defense.

To determine if the defense is available, therefore, the elements of a statute must be broken down into those of prohibited conduct and those of attendant circumstances. In rape, for example, the statute provides in relevant part: "A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when . . . the other person is compelled by force or imminent threat of force . . . commits rape." IC 35-42-4-1 (1992 Supp.) The prohibited conduct in the offense of rape in sexual intercourse with a member of the opposite sex by force or imminent threat of force. Compulsion of the victim, while an element of the offense, is an attendant circumstance, not prohibited conduct. Similar treatment could be given to the offense of criminal deviate conduct. Because culpability is not required as to attendant circumstances, and the mistake of fact defense is available only as to prohibited conduct which requires culpability, evidence that the defendant reasonably believed that the alleged victim consented to the sexual conduct is irrelevant.

Of course, although lack of

instructions do not meet the second

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consent is not an element of rape or criminal deviate conduct per se, evidence which has a tendency to prove either consent or lack of consent in relevant to the element of compulsion, which exists in both offenses. Evidence that the alleged victim consented to the sexual act is evidence that negates compulsion, while evidence that the alleged victim did not consent may be evidence that the victim was compelled.

Arguably, then, in order to raise the defense of mistake of fact in a rape or criminal deviate conduct case, there must be evidence that suggests the defendant was reasonably mistaken as to whether a sexual act occurred or whether force or threatened force was used, the prohibited conduct components of the offenses. Evidence that the sexual act or force or threat of force did not occur cannot raise a mistake of fact "defense" because that evidence denies the prohibited conduct, and there cannot have been a mistake about conduct which did not occur. For example, Tyson testified that he did not, at any time, force D.W. to engage in sexual conduct. Record at 5032 ("I did not violate her in any way."). Accordingly, he neither argues that he was reasonably mistaken an to the occurrence of sexual conduct or as to his use of force, nor does he claim that evidence of such a mistake was presented. Instead, he claims he was reasonably mistaken as to D.W.'s consent, a mistake which, arguably, in not a defense to rape or criminal deviate conduct.

prong of the test, that is, there is no evidence in the record from which a reasonable juror could conclude that Tyson reasonably believed D.W. consented to the sexual conduct.

Indiana has long recognized that an honest and reasonable mistake concerning a fact excuses criminal conduct which would not be criminal if the fact had been as the defendant reasonably believed. Davis v. State (1976), 265 Ind. 476, 478, 355 N.E.2d 836, 838; Noble v. State (1967), 248 Ind. 101, 105, 223 N.E.2d 755, 758; Squire v. State (1874), 46 Ind. 459, 461. "Honesty is a subjective test dealing with what [the defendant] actually believed. Reasonableness is an objective test inquiring what a reasonable man situated in similar circumstances would do. To require the giving of [the defendant's]

instruction, we must find some evidence of both." Davis, 265 Ind. at 481, 355 N.E.2d at 839; see also Woods v. State (1992), Ind. App., 587 N.E.2d 718, 723, trans. denied (An instruction which defines mistake of fact as a defense with three elements, one of which is that the mistake must be subjectively honest and objectively reasonable, clarifies the defense for the jury.)[20]

Thus, if the State presents a prima facie case of guilt, the defendant has the burden of going forward with an evidentiary basis for his mistaken belief of fact which could create a reasonable doubt in the jury's

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[20] The dissent makes "much ado about nothing," that is, that a mistake of fact instruction was given in Woods. In Woods, the propriety of an instruction on the defense was not an issue because both the State and the defendant tendered a mistake of fact instruction. Thus, Woods is not authority for the proposition that a mistake of fact instruction is always appropriate if consent is an issue.

mind that he acted without the requisite mental state. Hoskins v. State (1990), Ind., 563 N.E.2d 571, 575; Stoner v. State (1982), Ind., 442 N.E.2d 983, 985. Requiring a defendant to establish an evidentiary basis does not shift the burden of proof; the State retains the ultimate burden of proving beyond a reasonable doubt every element of the charged crime, including culpability, which must entail proof that there was no reasonably held mistaken belief of fact. Hoskins, 563 N.E.2d at 576.

Tyson asserts that his testimony provides ample evidence to support Tendered Instructions Nos. 5 and 6. During direct examination, Tyson testified that "I believe that we had both made it clear earlier that day what was going to happen, and that she came to my room at 2 o'clock in the

morning. I'm sure we made it clear,[21] Record at 5078; that D.W. responded in a positive manner to his kissing in the limousine while riding to his hotel, id. at 5019; and that while he was kissing her in the hotel room she was "dropping her jacket, you know, getting her jacket off quick," id. at 5023. He also testified that he complied with D.W.'s request not to ejaculate in her and that he asked her to stay the night.

Assuming Tyson's assertions, that he believed he and D.W. "made it clear" earlier in the day that they were going to have sexual intercourse and that, after the sexual conduct occurred, he asked her to spend the night with him, provide some evidence that he honestly

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[21] Tyson testified that earlier in the day, soon after he had met D.W., he explained to her "That I wanted to fuck her," and she responded, "Sure, just give me a call." Record at 5000.

believed D.W. consented to sexual intercourse, the assertions are not evidence of the reasonableness of that belief. See Davis, 265 Ind. at 481, 355 N.E.2d at 839. To determine whether there is evidence that Tyson's assumed belief was reasonable, we look to his description of the encounter:

> Q.: Did you undress her?
> A.: I did.
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> * * *
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> Q.: What happened then, Mr. Tyson?
> A.: As I'm kissing her, she's moving fast. I'm kissing her. She dropping [sic] her jacket . . . . I'm kissing on her neck and I'm kissing her around the ears, the back of her neck, her chest, her nipples, her stomach, and I believe she had a white shirt on as well. She's trying to get that off. So I came back while she was taking it off and she had taken off those shorts--she had some shorts. She took off her shorts. I took my shirt off at the time. She had took [sic] off her underwear and the underwear dropped to her knees, and I pulled the underwears [sic] off, and then I took off--I had shorts that I had took off [sic]. I

continued kissing on her body.
Q.: Then what happened?
* * *
A.: We were having oral sex a little while, and she had told me to stop, and she had told me to come up, come up. She said, "No, come up."
Q.: Meaning what?
A.: Indicating that she wanted me to insert my penis in her.
* * *
Q.: And what did you do then?
A.: She had told me not to come in her. She said, "Don't come in me, don't come in me. I'm not on the pill," and I pulled back and I ejaculated on her stomach and her leg.

Record at 5023-24.

Tyson's description is a plain assertion of actual consent. From this testimony, a reasonable jury could infer only that D.W. actually consented to sexual intercourse. There is no recitation of equivocal[22] conduct by

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[22] Equivocal is defined as "having two or more significations: capable of more than one interpretation: of doubtful meaning: ambiguous." Webster's Third New International Dictionary 769 (1976).

D.W. which reasonably could have led Tyson to believe that D.W. only appeared to consent to the charged sexual conduct; no gray area exists from which Tyson can logically argue that he misunderstood D.W.'s actions. According to Tyson, he exerted no force and D.W. offered no resistance; instead, she was an active and equal participant in the conduct. While this testimony would negate an element of the crime -- that Tyson forcibly engaged in sexual conduct with D.W.--and challenges D.W.'s credibility, it does not support the giving of a mistake of fact instruction.[23]

Tyson further argues that "many of

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[23] Tyson's testimony that he complied with D.W.'s request not to ejaculate in her is not relevant to this issue, as it does not tend to prove he believed that she consented to the sexual conduct immediately preceding its occurrence.

the statements [D.W.] admitted she had made to [Tyson] during the sexual conduct itself were consistent with a reasonable belief on his part that the sex was consensual." Appellant's Brief at 44. Specifically, D.W. testified that when Tyson saw she was crying during the rape and after the two acts of criminal deviate conduct, he asked if she wanted to "get on top," to which she responded in the affirmative without then explaining to him that she agreed to go on top only because she thought it would enable her to get away," id.; and that she asked Tyson to, "Please put a condom on"[24] and

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[24] This statement, by itself, does not reasonably support the inference that D.W. consented to sexual intercourse. However, D.W.'s request, along with Tyson's response, that he would prefer to ejaculate[] on her stomach and leg," Record at 5024, and Tyson's after-intercourse statements--"I told you I wouldn't come in you. Don't you love me now?" id. at 3153--suggest only the inference that

said, "I don't need a baby," Record at 3151. Tyson argues that "[a] properly instructed jury could have found (or entertained a reasonable doubt) that these exchanges could have led a reasonable person to believe that [D.W.] consented, even if in her own mind she may not have been consenting." Appellant's Brief at 44. However, in the context in which these statements occurred, that is, amidst D.W.'s unequivocal description of a sexual assault, they could not, as a matter of law, lead a reasonable person to believe that Tyson was reasonably mistaken as to D.W.'s consent to sexual intercourse.[25] Further, these

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Tyson was aware that D.W. did not consent to unprotected sexual intercourse.

[25] D.W. testified on direct examination:

A.: I walked out of the room,

out of the bathroom . . . and then I glanced over and I saw the Defendant in his underwear. . . .
Q.: What was your reaction?
A.: I was terrified.
Q.: What did you say?
A.: "It's time for me to leave."
Q.: Like that?
A.: Yeah.
Q.: And his response?
A.: "Come here." And he grabbed my arm, and then he was, like, "Don't fight me. Come here," and then he stuck his tongue in my mouth.

* * *

Q.: What did you do?
A.: Just pulled back. . . . He started saying, "Don't fight me." I tried to fight him. . . . It was like hitting a wall. It didn't do anything.
Q.: What did he do next?
A.: He started taking off that outer jacket that I had on. He started taking that off, and I'm like, Get off me. Stop. Get off me," and he just kept going. Then the next thing I knew, he put me down on the bed or slammed me actually down on the bed, and he started grabbing the rest of the stuff down, and he kept kissing me and kept saying, "Don't fight me, don't fight me, relax, don't fight me.

* * *

Q.: Did you try to negotiate with him?
A.: Yeah. What was after he put his hands in me, his fingers, in my vagina.
Q.: Okay, How did he get his hand down there?
A.: He was between my legs, and he just put his fingers in there, started jamming them in really, really hard, and that's when tears started to come to my eyes, and I was, like, "owww, please, stop."

* * *

Q.: Did you mention to him that you were worried about pregnancy?
A.: Yeah. That was--he started to pull out his penis, and he was over me, and I just freaked out and I started saying anything because I knew that hitting him and stuff wasn't going to help me. So, I just started saying anything that I could think of, like, "Please, I have a future ahead of me. Please, I have college. I can't have a baby. What are you doing?" You know, "Please put a condom on." I was just--anything to get him off of me so that I could get out of there, and he was just, like, "Well, I don't have anything and I know that you don't." I'm like, "Please, I don't need a baby. I don't need a baby." I was begging

him. I was saying anything that I could say to him, and nothing worked. He was just, like, "So we'll have a baby," and he just jammed himself in me. . . . [H]e exposed his penis.
Q.: What did he do then?
A.: He jammed it in my vagina.
Q.: What did you do?
A.: I screamed out--not screamed, but I was like, "Owww," and then I just started crying and I--
Q.: Pain again?
A.: Yes.
Q.: Did you tell him you hurt?
A.: Yes. . . . It was just excruciating. It just hurt. He just slammed himself in me. It just felt like someone was ripping me apart. I don't know how to explain it. It just hurt.
Q.: Okay. What efforts, if any, did you make to try to get loose, to try to get away?
A.: I was trying to punch him and stuff like that. I was trying to back up. I was trying to do a lot of things. Nothing worked.
Q.: Okay. What's he doing while you're trying to do all this?
A.: He was telling me not to fight him, and then he started saying, "Don't fight me, mommy. Don't fight me,"

and he just kept going. He just kept slamming himself really hard.

* * *

Q.: Did you change position?
A.: At one point, he said, "Oh, you're crying," and he stopped for a second and his voice started to, like, be a little bit normal again, and then he just turned evil again, and really mean, and his eyes got all mean, and he just kept going really hard, and then he goes, like, "Well, do you want to be on top?" and I thought I could get away. So I said, "Yeah," and I was crying when I said it, and he flipped over. Then I tried to get away, and he was, like, "I told you not to fight me," and he slammed me back down again and rolled back over again.
Q.: Okay. Do you have any idea as to how long he remained inside of you?
A.: Until he was done. . . . Until he ejaculated.
Q.: Did you see him do that?
A.: Yes.
Q.: Tell us what he did.
A.: He pulled back and there was stuff coming out, and he said, "I told you I wouldn't come in you. Don't you love me now."
Q.: He said, "Don't you love me now?" and what was your response?
A.: I just looked at him like

statements all occurred after the criminal deviate conduct took place; therefore, they could not support a mistake of fact defense to the criminal deviate conduct counts.

As Tyson argues, "as a matter of Indiana law, he is entitled to have the jury consider all available testimony in order to determine whether he actually and reasonably mistook [D.W.'s] words and conduct to communicate her consent." Appellant's Reply Brief at 19 n.34 (emphasis in original). However, an examination of the testimony of D.W. and Tyson, the only testimony available as to the events in the hotel room, reveals evidence of only consent or compulsion; there is no evidence of equivocal conduct that a reasonable person in

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I was disgusted.

Record at 3144-53.

Tyson's position could have reasonably misinterpreted as D.W.'s consent to the charged sexual conduct.

Tyson asks us to consider that D.W. "met Tyson later, under circumstances which suggested an interest in sex--she accepted an invitation at 1:40 A.M., voluntarily accompanied Tyson to his hotel room, and willingly sat on his bed with him." Appellant's Brief at 44. This conduct may support a determination that a reasonable person in Tyson's position reasonably could have believed D.W. would at some point be willing to consent to sexual conduct; it also is consistent with Tyson's testimony of consensual sexual conduct. However, considering D.W.'s testimony of unequivocal compulsion at the time the sexual conduct occurred, her willingness to meet him and her alleged

"interest in sex" does not support the determination that a reasonable person in Tyson's position reasonably, but mistakenly, could have believed that D.W. consented to sexual conduct at the pertinent time--immediately preceding the sexual conduct.

Tyson testified to one set of events, D.W. to another. Tyson's testimony compels the conclusion that D.W. unequivocally gave her actual consent to sexual conduct and participated in it; D.W.'s testimony compels the conclusion that Tyson forcibly performed sexual conduct upon her. Thus, neither witness's testimony provides the basis for a reasonable mistake because neither testimony contains equivocal conduct which reasonably could have been misunderstood by Tyson.

Neither is there conflicting

testimony which could be harmonized so as to support a mistake of fact instruction; D.W. and Tyson did not testify to different interpretations or perceptions of basically uncontroverted conduct. Their respective testimonies describe two different and irreconcilable events that cannot be harmonized and taken together to provide evidentiary support for the instruction in question.[26]

"In spite of our preference to leave determinations of reasonableness to the jury, which embodies the values of the community, we find no evidence

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[26] Tyson argues that a "properly instructed jury might well have concluded that the truth of what occurred in the hotel room lay somewhere between Washington's inculpatory account and Tyson's exculpatory one." Appellant's Brief at 46 (emphasis in original). This, however, is not a criteria for our review of a tendered instruction; rather, we review the record to see if the evidence presented could support the instruction.

here from which the jury could have determined that [Tyson's] belief was reasonable," as required by Indiana law.[27] Davis, 265 Ind. at 481, 355

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[27] The dissent cites People v. Burnham (1987), 176 Cal. App. 1141, 222 Cal. Rptr. 630, rev. denied, in which the California Court of Appeals states that whenever a defendant testifies to the complainant's unequivocal consent to sexual conduct he also triggers the "defense of a bona fide belief in the victim's consent" and a mistake of fact instruction is required. Id. at 1148, 222 Cal. Rptr. at 641 (citations omitted). Thus, under Burnham, as long as a defendant expresses his subjective belief that the victim consented, a mistake of fact instruction is warranted whether or not that belief was reasonable. This view is not uniformly held in other jurisdictions. In Indiana, evidence from which a reasonable jury could find both an honest and reasonable belief on the part of the defendant is required before a mistake of fact instruction may be given. Davis, 265 Ind. at 479, 355 N.E.2d at 839. Evidence of actual consent alone does not trigger the instruction regarding mistake of fact. The dissent suggests nothing more than that we (1) modify Indiana law requiring evidence of objective reasonableness by deleting that requirement, or (2) require such a minimal showing of objective reasonableness as to, in essence, require nothing more than a subjective

belief of consent.

The dissenter's statement that "[r]efusal to give the instruction upon grounds that no reasonable person would have interpreted the evidence to indicate the victim's consent impermissibly invades the jury's province" is in error. Slip Opinion at 67. As stated, there must be evidence in the record of an honest and reasonable mistake of fact in order to require the giving of a mistake of fact instruction. Thus, our review of the evidence necessarily includes a determination of whether a reasonable person in the appellant's position could have interpreted the complainant's actions as indicating consent to the sexual conduct. This court has historically applied this standard in determining whether a trial court erred in refusing to give a requested instruction. See, e.g., Davis, 355 N.E.2d at 839. Our analysis of the evidence differs from the jury's because we must determine whether as a matter of law the evidence of record supports the giving of a mistake of fact instruction. We do not ask, as the jury would if an instruction were warranted, whether, in fact, the defendant was honestly and reasonably mistaken and therefore not guilty. See Boyd v. State (1991), Ind., 564 N.E.2d 519, 522 (holding that the evidence of mistake of fact produced at trial did not provide the requisite predicate for any instruction on the issue of mistake of fact because it did not support a finding that the mistake was reasonable).

N.E.2d at 840.

In contrast, the trial court's instructions to the jury were accurate. The trial court gave Final Instruction No. 19, which articulates the elements of the crime of rape, including "the State must have proved . . . [Tyson] . . . knowingly or intentionally . . . had sexual intercourse with [D.W.] when . . . [D.W.] was compelled by force or imminent threat of force," Record at 1262, and Final Instruction No. 21, which articulates the elements of deviate sexual conduct in the same way. It also gave Final Instruction No. 18, which defines the terms intentionally and knowingly. Id. at 1261. These instructions properly instructed the jury regarding the culpability required for the offenses with which Tyson was charged, and properly focused the jury on the task of determining whether the

State proved beyond a reasonable doubt that Tyson knowingly or intentionally used force to have sexual conduct with D.W. when D.W. was compelled by the force. The trial court did not err in refusing Tyson's Tendered Instructions Nos. 5 and 6.

VII.

Tyson argues the trial court erroneously excluded his Tendered Final Instruction No. 1, which reads:

> While the jury is the judge of the facts, I am the judge of the law. You must accept my instructions as to the law that governs this case, and then apply that law to the facts as you find them.

Record at 1231. The instruction was properly excluded.

Tyson frames this issue as:

> The court then refused to give an instruction proffered by the defense that would have properly informed the jury of its role under Indiana law: "you must accept my instructions as to the law that governs this case, and then apply that law to the

> facts as you find them." (R.1231) Refusal to give this instruction was error.

Appellant's Brief at 59. Throughout his argument, Tyson discusses the omitted instruction as if it were tendered without the first sentence; in fact, the first sentence does not appear anywhere in either Tyson's initial brief or his reply brief.[28] Tyson's argument is therefore not related to the instruction as it was tendered and refused, and he fails to present an issue in this regard for our review. See Ind. Appellate Rule 8.3(A)(7) ("When error is predicated on

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[28] Thus, Tyson's argument that it was error to refuse to instruct the jury that "you must accept my instructions as to the law that governs this case, and then apply that law to the facts as you find them" is untenable; such an instruction was never tendered to the trial court. See Beasley v. State (1983), Ind., 445 N.E.2d 1372, 1374-75 (A trial court has no duty to revise a tendered instruction so that it may properly be given.).

the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto."); Taylor v. State (1992), Ind., 587 N.E.2d 1293, 1303; Norris v. State (1986), Ind., 498 N.E.2d 1203, 1206.[29] We will, however, as did the court in Taylor, examine the argument as presented.

As stated supra, when reviewing the refusal of a tendered instruction, we must determine whether the instruction correctly states the law, whether the record supports the giving

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[29] Tyson's appellate counsel demonstrated his awareness of the requirements of Ind.Appellate Rule 8.3(A)(7) in his brief. See Appellant's brief at 17 n.16 ("The text of the tendered and given instructions [relevant to Issue II] are set out verbatim in the Argument. See infra, Issue II, as required by Ind. Appellate Rule 8.3(A)(7).").

of the instruction, and whether the substance of the excluded instruction is covered by the instructions which were given. Taylor, 587 N.E.2d at 1303. The instruction at issue here is not a correct statement of Indiana law, as its first sentence directly conflicts with Indiana Constitution art. 1, § 19, which provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." A trial court may properly reject an instruction which, in whole or in part, incorrectly states the law. Jones v. State (1983), Ind., 445 N.E.2d 92, 93.

Further, the instructions which were given by the trial court properly explain the role of the jury. In its preliminary instructions, the court instructed the jury:

> You are also the finders of the law that applies to this case, being guided by the instructions given by the

> judge. You should, however, find both the law and the facts as they are and not as you would like them to be. The instructions of the Court are your best source in determining what the law is.

Record at 5518. The court's final instructions ended with the charge:

> Thus, you are oathbound to find the facts honestly and accept the law faithfully as both exist, and you should return that verdict which you find just and proper under the law as given to you in these instructions and the evidence duly presented during trial.

Id. at 5536. These instructions correctly and unambiguously define the role of the jury under the Indiana constitution. They properly instruct the jury that the court's instructions are the source for the jury's determination and application of the law, and they do not permit the jury "'to make, repeal, disregard, or ignore the law as it exists.'" Armstead v. State (1989), Ind., 538 N.E.2d 943, 946

(quoting Johnson v. State (1988), Ind., 518 N.E.2d 1073, 1076).[30] The trial court properly rejected Tyson's tendered instruction, which incorrectly states the law, in favor of instructions which clearly and accurately describe the role of the jury under Indiana law.

VIII.

Tyson argues that he was denied due process because the prosecutor was able to select the trial judge who would preside over his case. The current system of assigning criminal

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[30] Tyson cites Johnson for the proposition that "the jury should be instructed unequivocally that its power to determine the law does not carry with it any 'right to make, repeal, disregard or ignore the law as it exists.'" Appellant's Brief at 59. Johnson holds that an instruction containing this language correctly states the law. The language used by the court here, that the jury must "find both the law and the facts as they are and not as you would like them to be" is an equally correct expression of the law.

cases to particular divisions in Marion County erroneously permits the prosecutor to determine the particular room within the criminal division to which a case is assigned. However, because Tyson has failed to show that he was prejudiced in any way by the selection of the particular room, he was not deprived of his due process rights.

On July 29, 1991, the Marion County prosecutor filed a petition requesting that a special grand jury be convened to investigate D.W.'s allegations against Tyson. Pursuant to IC 35-24-2-14 (1988), the prosecutor could file this petition with any judge in Marion County; he chose to file it with Judge Gifford, who was presiding in Room 4 of the criminal division. On September 9, 1991, the special grand jury returned a true bill indicting

Tyson. By local rule an indictment is filed in the room which impaneled the grand jury. Record at 5673. Therefore, the true bill indicting Tyson was filed in Room 4, with Judge Gifford presiding. In this way, the prosecutor selected the particular room and, in the absence of a valid motion for change of judge, selected Judge Gifford as the presiding judge.[31]

"Before an appellant is entitled to a reversal, he must affirmatively show that there was error prejudicial to his substantial rights." Sharp v.

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[31] The trial court found that "I don't believe that there's been any evidence submitted to show that there was any reason that it was used to come to this court in deference to any other court. Therefore the presumption would be that it was done on a random basis." Record at 5691. Tyson "does not concede that the prosecutor's motive in this case was anything but strategic," but argues that due process is violated by the judge selection process itself, regardless of the prosecutor's motives or strategic considerations. Appellant's Brief at 64-65 & n.74.

State (1989), Ind., 534 N.E.2d 708, 714 (citation omitted), cert. denied, 494 U.S. 1031 (1990). Thus, error alone is not enough to establish a violation of Tyson's right to due process; Tyson must also show that he was, in fact, denied a "fair trial before an impartial judge." See Harrington v. State (1992), Ind., 584 N.E.2d 558, 561. The law presumes that a judge is unbiased and unprejudiced, Smith v. State (1989), Ind., 535 N.E.2d 1155, 1157, and Tyson has failed to present any evidence to overcome that presumption or to show that he was prejudiced in any other manner.[32] In

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[32] In his reply brief, Tyson states:

> The State seems to suggest that the defendant must show that the trial court's rulings unfairly favored the prosecution. Proof on this point can be found in the court's recently-appealed ruling denying defendant's Verified Petition for Post-Conviction

fact, Tyson expressly stated before trial that he had no reason to doubt Judge Gifford's impartiality, see Record at 360-61 (Tyson's Memorandum in Support of Motion for Random Selection of Judge); id. at 5683 (hearing on Motion for Random Selection of Judge), and he apparently did not believe she was biased after trial, either, as he did not seek a change of judge when he filed his petition for post-conviction

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> Relief . . . . Without even permitting defendant an opportunity to respond to the State's Motion for Summary Disposition of the Petition for Post-Conviction Relief, the trial court adopted the State's untrue and contested factual allegations as its own and then, without any basis, falsely accused the defense of trying "to perpetrate a fraud upon the court."

Appellant's Reply Brief at 35 n.52. This is the only place, throughout both his trial and his appeal, in which Tyson alleges that Judge Gifford was in any way biased against him. An adverse ruling alone is not sufficient to prove bias. Beverly v. State (1989), Ind., 543 N.E.2d 1111, 1115.

relief. See Ind.Post-Conviction Rule 1(4)(b) (allowing for change of judge when judge has personal bias or prejudice against petitioner). Tyson has failed to show that the fairness of his trial was in any way affected by the method by which Judge Gifford was selected to preside; therefore, he has failed to demonstrate he was denied due process of law.

However, we strongly urge the criminal division of the Marion County Superior Court to change the method by which cases are assigned to the rooms in the division. The existing system of filing cases is totally inappropriate and must be abandoned in favor of a system in which the prosecutor cannot control the assignment of a case to a particular

judge.[33] Presently, the criminal division of the Marion County Superior Court lacks the appearance of impartiality that is required to maintain the confidence of the public and the accused in the system.

Judgment affirmed.

ROBERTSON, J., CONCURS.

SULLIVAN, J., DISSENTS, WITH SEPARATE OPINION.

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[33] We note that even if the prosecutor had not requested a special grand jury, the system in place currently allows prosecutors to choose which judge will hear a case. Cases are assigned sequentially to the six Marion County criminal division judges in blocks of fifty cases, and it is possible for a prosecutor to find out when cases are being assigned to a certain judge and file his or her information at that time. See Record at 5674-75. This system is no less objectionable than the system by which Tyson's case was assigned.

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IN THE

COURT OF APPEALS OF INDIANA

SECOND DISTRICT

MICHAEL G. TYSON,	)
	)
Appellant-Defendant,	)
	)
vs.	) No.49A02-9203-
	) CR-129
STATE OF INDIANA,	)
	)
Appellee-Plaintiff.	)

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION FOUR
The Honorable Patricia J. Gifford,
Judge
Cause No. 49G04-9109-CF-116245

SULLIVAN, J., DISSENTING

The State opened its oral argument before this Court correctly stating as follows:

> "Before I address what this appeal is all about, I wish to take a moment to address what this appeal is not all about. This appeal is not about reweighing the evidence as the defense would have you do. This appeal is not about reweighing or re-evaluating

> the credibility of the witnesses as defense would have you do. This appeal is not about second-guessing the judgment of Judge Gifford or replacing her judgment with your judgment as the defense would have you do. Rather what this is, is simply a proceeding to determine whether or not Judge Gifford committed such errors of judgment as to warrant the reversing of the conviction of Rape and Deviate Sexual Conduct returned by a Marion County Superior Court jury against Michael Tyson and granting to him a new trial." (Argument by Mr. Reuben, Deputy Attorney General, as transcribed from audio cassette tape.)

It is therefore important to acknowledge and, in making our decision, to emphasize to all concerned parties that this appeal is not about whether Michael Tyson raped D. W. and/or perpetrated two sexual deviate acts upon her. As noted by the State, our decision in this appeal does not, and should not, depend upon whether the evidence was sufficient to permit the

jury to reasonably conclude that Michael Tyson committed the three criminal acts charged. Rather, the issues involve whether the prosecution and the defense were afforded a level playing field upon which to put forth their respective cases. This appeal is quite simply about whether Michael Tyson received a fair trial. He was entitled to nothing more. But most assuredly he was entitled to nothing less. My review of the entire record in the cause leads me to the inescapable conclusion that he did not receive the requisite fairness which is essential to our system of criminal justice.[34]

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[34] In this regard I wish to make it clear that I fully concur in the majority opinion with respect to Issue VII. That issue involves the process by which the judge was selected. We necessarily condemn that process. However, there is absolutely no evidence or permissible inference that Judge Gifford acted in any manner other than with total lack of bias or prejudice. That I believe several of

For this reason I dissent. I would reverse all three convictions and would remand for a new trial.

More particularly, I dissent with respect to two major issues: Issue I, dealing with the exclusion of testimony from Ms. Martin, Ms. Lawrence and Ms. Neal; and Issue VI, dealing with refusal of instructions concerning Tyson's belief with respect to whether D.W. consented to the sexual acts involved.[35]

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the judge's rulings were erroneous, requiring reversal, in no way dispels my belief that Judge Gifford acted with complete and unswerving judicial integrity and impartiality.

[35] Because upon a retrial at least one of the other issue involved could recur, I consider it not inappropriate to state my disagreement with a pronouncement by the majority.

With respect to Issue V which concerns the reading of a portion of Justice White's dissent in United State v. Wade (1967) 388 U.S. 218, I agree that the defendant waived the matter because his objection was inadequate. I do not agree, however, that a jury

In dealing with the exclusion of testimony, the trial court exercises considerable discretion. In reviewing the exercise of a trial court's discretion when the trial court has articulated specific reasons for the particular ruling, "we may not attribute to the trial court some other legitimate but unexpressed reason". Palacios v. Kline (1991) 3d Dist. Ind.App., 566 N.E.2d 573, 575. We must focus upon the discretion as it was exercised. We may not, after the fact, create appellate justification for the ruling. Discretionary trial court rulings must be reversed not only when the exercise of discretion is without

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admonition could cure the prejudicial impact of the language read. Reading of the passage on the future by prosecutors, whether during voir dire or opening or closing argument should be condemned in the strongest possible terms. See Bardonner v. State (1992) 4th Dist. Ind.App., 587 N.E.2d 1353, trans. denied.

reason, but also when it is based upon impermissible reasons or considerations. The question is whether the trial court, for the reasons given, properly denied defendant's request to call the three witnesses to testify. City of Elkhart v. Middleton (1976) 265 Ind. 514, 356 N.E.2d 207.

I discern no persuasive rationale which permits a reviewing court to give a criminal trial court much more latitude in making evidentiary rulings than is given to civil trial courts. I agree with the majority's position that deference should be afforded rulings of trial courts. That deference, however, has limits and boundaries. The majority begs the question in perceiving a difference between rulings made after the trial court properly applied applicable legal standards and rulings made after application of incorrect

legal standards. It goes without saying that determinative deference is given to a ruling in the former category. Quite simply, a ruling made by correct application of applicable legal standards is a correct ruling and will be affirmed. It is not a matter of giving deference at all.

The trial court's ruling was based first upon the conclusion that, although not acting in bad faith, the defense nevertheless had substantially breached the discovery order by a delay in notification to the State as to the existence of the witnesses. The second reason given was that to permit the three witnesses to testify would result in prejudice to the State in that several State witnesses, including D.W., had concluded their testimony. The latter rationale was premised, in large measure, upon the State's

contention that it would interrupt the flow of the State's presentation and would undoubtedly require recalling some witnesses and obtaining new witnesses, all of whom would testify in an allegedly less effective manner upon rebuttal.[36]

BREACH OF DISCOVERY AND DELAY

Although there was a time lapse between the receipt of information by Mr. Webb that certain witnesses with relevant information might exist and notification to the State, such "delay" did not and could not have violated the

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[36] The trial court added that it did "not appreciate being put in this position in the middle of a trial that's taken a great deal of effort, if there is any possibility that it was done with the idea of causing some kind of a reversible error." Record at 4206. Clearly, however, the trial court would not have refused an otherwise valid request to present newly discovered evidence merely because it might affect, in some adverse manner, the substantial effort already put forth by the court.

discovery order of the court. The discovery order of December 11, 1991 directed exchange, by December 18, 1991, of lists of all witnesses expected to be called. Clearly, and as noted by the majority, prospective witnesses whose existence was not discovered until January 30, 1992 could not have been listed and disclosed to the State prior to December 18, 1991. The perceived "discovery breach" could then only refer to the "delay" between Thursday evening, January 30, when Mr. Webb received a phone call concerning possible witnesses, and Sunday when the names of the three individuals and the general substance of their anticipated testimony were given to the State.

Defense counsel had a duty to make reasonable investigation before seeking to add witnesses. Furthermore, for defense counsel to prematurely and

without investigation advise the prosecution of witnesses who might well provide evidence against the defendant would be a breach of the ethical duty to one's client. Defense counsel is not required to, and may not ethically, assist the prosecution in its collection of evidence, case preparation, and trial presentation. Not only was there no discovery order breach, there was no delay, substantial or otherwise.

Even if there were some degree of unexplained delay, given the absence of bad faith upon the part of the defense, the State at most would be entitled to a continuance. Boyd v. State (1985) Ind., 485 N.E.2d 126. Failure to request a continuance constitutes a waiver of an alleged discovery breach. Jester v. State (1990) Ind., 551 N.E.2d 840, 842.

The majority correctly observes that there was no necessity to seek a continuance when the trial court had already made its ruling excluding the testimony. The fact that the evidence was excluded, in part because of a discovery breach upon the part of the defendant, does, however, bring the protection of a continuance into play. The State's clear desire to avoid a continuance destroys the State's argument that exclusion was justified by a discovery breach upon the part of defendant. Such a breach, absent bad faith, calls for a continuance -- not exclusion of the evidence. As held in Patel v. State (1989) Ind., 533 N.E.2d 580, 585: "[E]xclusion of the evidence is appropriate only when the [defense] has blatantly and deliberately refused to comply with the discovery order." Notwithstanding McCullough v. Archbold

Ladder Co. (1993) Ind., 605 N.E.2d 175, cited by the majority, Patel has not been overruled.

Not only did the State not seek a continuance, it categorically stated that it did not want a continuance. The State did not want the "flow" of its case interrupted. It offered the view that certain of the witnesses who had concluded their testimony would have to be recalled and other new witnesses called as rebuttal witnesses and opined that rebuttal evidence is generically less effective and given less weight than testimony during the case in chief. I believe such speculative conclusion is wholly erroneous, particularly because the State could clearly explain to the jury the reason why the rebuttal was necessary. Furthermore, the fear of the prosecution was wholly unjustified in

light of the remote and unlikely possibility that the jury, for reasons solely related to the order of presentation, would erroneously diminish the weight to be given the testimony. The jury was clearly instructed that they should seek to indulge the theory

> "that every witness is telling the truth . . . that [they] should not disregard the testimony of any witness without a reason and without careful consideration . . . [that] the number of witnesses who testify to a particular fact, or the quantity of evidence on a particular point need not control [their] determination of the truth . . . [and that they] should give the greatest weight to that evidence which convinces [them] most strongly of its truthfulness." Record at 1117.

In any event, the arguable inconvenience to the prosecution does not justify preventing the defense from presenting relevant evidence which

might have tipped the balance in light of the reasonable doubt standard governing the jury.

The State's position with respect to the prejudice to its presentation of evidence becomes somewhat schizophrenic, and most certainly inconsistent. On the one hand, the State attempts to diminish the importance of the testimony of the three witnesses by asserting that it would have had minimal impact upon the issues and was meaningless as merely cumulative. On the other hand, the State has acknowledged that the excluded testimony might have grave implications for a successful prosecution. It so indicated by emphasizing the great lengths to which the State would have to go to combat this testimony. It is clear that the State did not think the evidence to be

merely cumulative. The State was very concerned "given the impact of these witnesses on this case, given the notoriety of this case, given what this case is all about . . . . These witnesses clearly would have been telling a story wholly different than the story we had." (Argument by Mr. Reuben, Deputy Attorney General as transcribed from audio cassette tape.)

As earlier noted, we are restricted in validating the ruling of the trial court to the reasons she gave. The trial court did not base its exclusion of the testimony upon a determination that the proffered evidence would merely be cumulative. The majority here, however, utilizes a conclusion to that effect to affirm the ruling. In doing so it errs. It is appropriate to consider that issue, however, in terms of harmless error and

I will do so. The question is whether the exclusion was harmless beyond a reasonable doubt.

The question as to whether evidence is merely cumulative is normally found in cases in which a new trial is sought for newly discovered evidence. Certainly, if, following judgment, evidence is newly discovered which is not merely cumulative and is of such character as to call for a new trial, evidence of the same character should even more readily be admitted if discovered during trial. When the newly discovered evidence is advanced in sufficient time to permit the opposing party an opportunity to prepare adequate cross-examination or produce contrary witnesses, it should not be excluded. The trial court's erroneous ruling here has given rise to the necessity for a new trial. That drastic

but necessary step could have been averted by permitting the three witnesses to be called and to testify.

It is my view that the majority erroneously or inadvertently uses the term "cumulative" interchangeably with the term "corroborative". Cumulative evidence is that which goes to prove what has already been established by other evidence. Davis v. State (1983) Ind., 456 N.E.2d 405; Newell v. Walker (1985) 2d Dist. Ind.App., 478 N.E.2d 1246. It is evidence "of the same kind, to the same point." Union Central Life Insurance Co. v. Loughmiller (1903) 33 Ind.App. 309, 314, 69 N.E. 264, 266. Corroborative evidence tends to corroborate or to confirm while cumulative evidence merely augments or tends to prove what has already been proved. State v. Kennedy (1979) 122 Ariz.App. 22, 592 P.2d 1288. The

distinction has been synthesized as follows:

> "Cumulative evidence is additional evidence to support the same point, and which is of the same character with evidence already produced. . . . Though on the same point it may yet not be cumulative, but, if of the same kind, it is cumulative. . . . If it is of a different kind, though upon the same issue, or of the same kind upon a different issue, it is not cumulative. . . . Evidence which brings to life some new and independent truth of a different character, although it tends to prove the same proposition or ground of claim before insisted on, is not cumulative, within the true meaning of the rule. . . . The fact that newly discovered evidence may tend to prove the same issues upon which proof was offered at trial does not necessarily make it cumulative, and whether or not it is cumulative is to be determined from its kind and character, rather than from its effect." 10A Words and Phrases, Cumulative Evidence 406-07 (1968) (citations omitted).

The testimony sought to be

admitted here was different in kind and character from other evidence adduced at trial. It went to an issue or issues and to facts or observations not covered by other evidence. It was not cumulative. It may have been in the nature of corroboration with respect to the crucial facts surrounding and immediately preceding the sexual acts but that very aspect of corroboration is what made the exclusion of the evidence prejudicial to the defense.

One federal commentator, citing Gordon v. United States (1953) 344 U.S. 414, 73 S.Ct. 369, has stated that reversal will lie "[w]hen the record appears to show that the excluded evidence would have been more persuasive than, or would have afforded needed corroboration to, evidence already in the record." 3 Orfield's Criminal Procedure Under the Federal

Rules §26.342 (1986).

In Shepard v. State (1983) 1st Dist. Ind. App., 451 N.E.2d 1118, trans. denied, Judge Robertson, speaking for the court and joined by Judges Shields and Buchanan, reversed a conviction for excluding evidence of threats made to the defendant who was claiming self-defense. The court, apropos of the case before us, reversed because: "When a defendant claims that he acted in self-defense, evidence legitimately tending to support his theory is admissible . . . [and because] these threats are relevant to Shepard's defense and his claim of having a good faith belief of great bodily harm." 451 N.E.2d at 1120.

United States v. Peak (1988) 7th Cir., 856 F.2d 825, cert. denied, 488 U.S. 969, 109 S.Ct. 499, is to the same effect and is also persuasive. There,

the court reversed a conviction for exclusion of evidence which would have reflected the defendant's state of mind and which bore upon his intent, or lack thereof, to possess and distribute drugs. The court also, interestingly, instructed the trial court upon remand that it "should reevaluate its refusal to give the jury an instruction on [defendant's] theory of defense". 856 F.2d at 836.

The only other witnesses to the events upon which the proffered testimony focused were D.W. and Tyson. Those two witnesses could certainly not be classified as disinterested witnesses. The testimony of an objective witness is not of the same character as evidence from a prosecuting witness or the defendant himself, or from others with a direct personal stake in the outcome. In

Newell v. Walker, supra, we ordered a new trial for newly discovered evidence which was comprised of testimony of "the only disinterested person to witness events crucial to the case . . .." 478 N.E.2d at 1251. See also Harris v. Jay (1930) 92 Ind.App. 543, 174 N.E. 107; State v. Evans (1920) Or., 192 P. 1062, 1065. Shumaker v. State (1988) Ind., 523 N.E.2d 1381, relied upon by the majority, is inapposite. In Shumaker, the defendant himself characterized the excluded evidence as having only a "slight tendency" to establish defendant's non-violent nature. Furthermore, the excluded witness was not wholly disinterested, having been a bowling partner of the defendant and the victim for some five years, and her testimony would have merely duplicated other testimony as to defendant's character.

One aspect of the majority opinion considers the excluded evidence as merely impeaching in nature and holds that it was merely cumulative of evidence which impeached D.W. "on other points". Slip Opinion at 18-19. I strongly disagree. Even if the offered evidence were to be construed solely as impeaching, impeachment upon one issue is not cumulative of impeachment upon other issues. To so hold is to say that impeachment with regard to an essential issue of the litigation is merely cumulative to evidence which impeaches as to a minor collateral matter.

The evidence of record, to which the excluded evidence is thought by the majority to be cumulative, demonstrates that the jury was entitled to believe that there was consensual sexual contact in the hotel room. There was testimony to that effect from Reverend

Katherine Newlin, who attended D.W. at the hospital. Record at 4398 (as quoted by majority in footnote 11). At a very minimum, such testimony gives rise to a strong and reasonable inference of consensual sexual contact in the hotel room. It is baffling indeed, therefore, that the majority proceeds to cavalierly discount the defendant's reasonable belief contention.

The manner in which Tyson and D.W. acted toward each other shortly before the acts complained of has great relevance to whether or not Tyson, at the time, might have reasonably believed, from all the surrounding circumstances and events, that D.W. was consenting -- even though as a factual matter she did not consent. The majority concedes that a reasonable jury might reasonably believe that Tyson had a reasonable belief that D.W.

would consent. Under the circumstances, this conclusion permits a corollary conclusion that the belief continued during the sexual acts. The issue is not whether Tyson reasonably believed that D.W. would consent. It is whether he reasonably believed that she was consenting. In this sense, then, the exclusion of the testimony from Martin, Neal and Lawrence was particularly prejudicial and that prejudice was magnified by the failure to give instructions with respect to mistake of fact, reasonable belief or to instruct that the degree of culpability, i.e., knowing, was applicable to the essential element of compelling force.

In holding that the evidence excluded was "only minimally corroborative of Tyson's testimony" with respect to D.W.'s receptiveness to Tyson's physical advances, the majority

usurps the jury function. It is totally inappropriate for this court to convert speculation as to the credit and weight which a jury would give certain evidence or the impact of such evidence upon their consideration of other evidence into a holding as a matter of law.

Without question there was error in excluding the testimony of Ms. Martin, Ms. Neal and Ms. Lawrence. Without question that error was not harmless beyond a reasonable doubt.

MISTAKE OF FACT AND REASONABLE BELIEF INSTRUCTIONS

Instructions Nos. 5 and 6 tendered by the defense were erroneously and prejudicially refused by the trial court. Instruction No. 5 concerned application of the culpability requirement of "knowingly" to the act of coercive force and whether Tyson could have reasonably believed that

D.W. had consented. Instruction No. 6 dealt with mistake of fact as to whether D. W. had consented.

Consent or the lack thereof is a fact. D.W. either consented or she did not. If she consented, that is a fact. If she did not consent, that is a fact. Resolution of this is a fact question, however, does not end the inquiry. The law provides that if a person accused of rape is reasonably mistaken as to the fact of consent when the alleged victim, in fact, did not consent, such mistake negates the culpability required for the crime. The "reasonable belief" principle, though similar, is not synonymous with mistake of fact. The difference was explained in People v. Rhoades (1987) 193 Cal.App.3d 1362, 238 Cal.Rptr. 909, 913:

> "'Where the defendant claims that the victim consented, the jury must weigh the evidence and decide which of

> the two witnesses is telling the truth.' The defense of a reasonable belief in consent by contrast, 'permits the jury to conclude that both the victim and the accused are telling the truth. [Citation omitted.] The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not.'" [Quoting People v. Romero (1985) 171 Cal.App.3d 1149, 1155-56, 215 Cal.Rptr. 634.]

However, in the context of the case before us, the concepts are so closely related as to be equated. See People v. Burnham (1986) 176 Cal.App.3d 1134, 222 Cal.Rptr. 630 (mistake of fact instruction equated with an instruction which directs the jury to acquit if the jury entertains reasonable doubt as to whether

defendant reasonably and in good faith believed that the victim freely consented).

Whether a defendant's mistake or belief is reasonable depends upon the attendant circumstances. In the case before us, those relevant and crucial circumstances are not restricted to the occurrences in the hotel room beginning with the point at which Tyson "undress[ed]" D.W. Slip Opinion at 36. They include other circumstances of the day and night preceding the encounter and the activities of the early morning hours which led to the occurrences which transpired in Tyson's hotel room. In this regard, as earlier noted, the excluded testimony of Ms. Martin, Ms. Neal and Ms. Lawrence would have added to the factual mix before the jury and may have reasonably tipped the deliberative balance in favor of

acquittal.

The evidence quoted and analyzed by the majority (see Slip Opinion at 36, et seq.), when taken together with the surrounding circumstances, permit a reasonable belief as to the fact of consent. Stated conversely, if the jury believed that Tyson used only such "force" as would be involved in a consensual sexual act, they may well have concluded that Tyson reasonably believed that D.W. was consenting. Regardless of whether D.W.'s subjective mental state reflected actual consent, and even if as a fact she did not consent, Tyson may have reasonably believed that she was consenting. That question is peculiarly within the prerogative of the jury. They were not permitted to exercise this prerogative, not only because they were precluded from hearing three relevant witnesses,

but because they were not advised of the appropriate legal principles which would constitute the essential framework within which to assess the evidence and to consider the relevant attendant circumstances. In short, by refusing to give defendant's tendered instructions, the trial court denied the jury the proper tools necessary for performance of their duty. They were effectively forced, in this regard, to make factual determinations in a vacuum.

It is improper to deny a reasonable belief instruction, as does the majority here, based upon an evaluation of the weight of the evidence or the credibility of the witnesses. Refusal to give the instruction upon grounds that no reasonable person would have interpreted the evidence to indicate

the victim's consent impermissibly invades the jury's province. As stated in People v. Burnnam, supra, 222 Cal.Rptr. at 637:

> "The . . . contention that we should declare, as a matter of law, the appellant's assertions [as to reasonable belief] are unreasonable is, in reality, a request that we declare the appellant's assertions to be incredible as a matter of law. The fact that the evidence may be incredible, or is not of a character to inspire belief, does not authorize the refusal of an instruction based thereon, for that is a question within the exclusive province of the jury.

Thus it is not true that when a defendant gives an account evincing the alleged victim's consent, and the victim gives a contrary version, that there is no evidence to support a reasonable belief instruction. Such a view is to say that the fact of consent or non-consent is the be-all, end-all of the issue. It is to hold that

mistake of fact or reasonable belief does not exist in Indians law.

In Woods v. State (1992) 1st Dist. Ind.App., 587 N.E.2d 718, trans. denied, the court, speaking through Judge Robertson, upheld the giving of a mistake of fact-reasonable belief instruction which had been requested by the State. The instruction advised the jury:

> "For the 'mistake of fact' to be a valid defense, the following three elements must be satisfied:
> 1. The mistake must be honest and reasonable;
> 2. The mistake must be about a matter of fact; and
> 3. The mistake serves to negate culpability.
> Honesty is a subjective test dealing with what the defendant actually believed. Reasonableness is an objective test inquiring what a reasonable man situated in similar circumstances would do."
> 587 N.E.2d at 723.

The instruction was approved because it "clarified the defense" of mistake of

fact. Id. In the context of the facts of Woods, the mistake of fact defense could only have been offered with regard to the defendant's belief as to the victim's consent.

While the word "consent" does not appear in I.C. 35-42-4-1, the word "compelled" is used. It is clear, therefore, that the force or threat of force must have compelling effect upon the alleged victim. The fact of coercion is therefore an indispensable element of the crime. The majority here attempts to divorce the word "force" from the word "compelled" in order to avoid the application of the required degree of culpability. This attempt, in my view, borders upon sophistry. The act upon which the definitions of the crimes focus is sexual intercourse, or deviate conduct by compelling force.

The majority considers the matter

of proof of culpability, upon which the prosecution bears the burden, as if it were a part of the "defense" of "mistake of fact" or "reasonable belief". As noted, the coercive aspect of the force used requires proof of culpability. The majority erroneously turns the matter away from proof of culpability, a prosecutorial requirement, and toward establishment of a defense by the defendant.

The majority seeks to draw a significant distinction between our culpability statute and that of the Model Penal Code. Model Code. § 2.02(4) does not use the word "conduct" in referring to material elements of the offense. This is not, however, particularly meaningful. Again, the prohibited conduct is force which coerces. The fact of coercion is without question a "material element"

of the act of "force". Without coercion, there has been no crime of rape or deviate conduct committed. Our statute and our law is wholly consistent with the Model Penal Code.

The fact of coercion is not merely an "attendant circumstance" as was the case in Rose v. State (1982) 2d Dist. Ind.App., 431 N.E.2d 521. It is an essential element of the act itself. In Rose, defendant shot and killed the victim and was convicted of battery. The "attendant circumstance" involved the victim's conduct, i.e., whether the victim was committing a forcible felony justifying intervention by the defendant. That circumstance is not part of the definition of battery as set forth in the statute. It was therefore not an element of the offense and application of the degree of culpability to it would have been

inappropriate.

Similarly, Markley v. State (1981) 2d Dist. Ind.App., 421 N.E.2d 20, involved battery as a Class C felony which requires serious bodily injury as an element. In that setting, the element is a clear result of the prohibited conduct. In essence, the statute prohibits the act of touching in a rude, insolent or angry manner and, as the holding in Markley points out, the result, although an element of the crime, merely "increases the penalty for the offense committed without proof of any culpability separate from the culpability required for the conduct elements of the offense." 421 N.E.2d at 21.

The rape and deviate conduct statutes clearly differ from the battery statute in this respect. Again, in the former statutes, the "result"

element is an integral part of the prohibited conduct element. It is not mere force which is prohibited. It is coercive force.

The concept of victim impact as an element of the prohibited conduct is very much a part of Indiana criminal law. A person commits theft under I.C. 35-43-4-1(4) if he exercises unauthorized control over the property of another by creating a false impression in the other person or under subsection (5) by failing to correct a false impression that the defendant knows is influencing the other person. Thus under subsection (4) we look to the victim's state of mind as to whether the false impression did in fact exist and whether the impression was otherwise than what the true facts disclosed. Under subsection (5) the culpability of the defendant is tied

directly to the effect of the defendant's conduct and its subjective impact and influence upon the victim.

More closely related to the case before us is the crime of child molesting. I.C. 35-42-4-3 (e) makes it a defense if the defendant reasonably believed that the child was over the age of sixteen. Thus, although as a fact the child is under the age of sixteen, if the defendant reasonably believes otherwise he has not committed the crime. Neblett v. State (1979) 2d Dist. Ind. App., 396 N.E.2d 930. A similar situation exists with respect to the crime of rape as it relates to a mentally disabled victim. I.C. 35-42-4-1.

In Garcia v. State (1983) Tex.Cr.App., 661 S.W.2d 96, 97, the court spoke to the matter as follows: "The female's condition, coupled with

the male's knowledge of the mental defect or disease, substitutes for lack of consent by the female (Emphasis in original.) The court in examining the record stated that the victim "had all the outward appearances of a normal appearing twenty-six year old female" and that defendant had no reason to know of her mild retardation. Clearly then, the defendant's perception of the situation in many areas of the criminal law is important, particularly with regard to sex crimes such as here involved.

It is argued, and the majority opinion adopts the argument, that the jury's determination that D.W. did not consent carries with it a corollary -- that the same evidence could not support an instruction that a person could reasonably believe that she did consent. This in turn leads to the

majority's conclusion that Instructions 5 and 6 were not supported by the evidence and their refusal was not error at all, or that error, if any, was harmless. The reasoning is faulted.

It cannot be emphasized too strongly that the question is not sufficiently of the evidence to convict of rape and deviate conduct. The question in regard to the instructions is, rather, whether Michael Tyson was entitled to have the jury assess that evidence in the light of applicable law.

The assessment of the evidence and the import given to certain portions of the evidence might differ depending upon the instructions given. This is the very purpose of jury instructions. The question then becomes: Would the verdict arguably have been different if

the instructions had been given? The answer is: We simply do not know. We cannot say that the failure to give the instructions, particularly in the light of the exclusion of relevant evidence, was harmless beyond a reasonable doubt.

The instructions, if given, might have resulted in the same verdict. But they might not have. The jury, in light of the instructions might have reasonably concluded that while D.W. did not consent, Tyson did have an honest and reasonable belief that she did so. The jury was entitled to make that determination, not the trial court and certainly not this court.

The erroneous rulings herein considered dictate reversal and remand for a new trial.

IN THE
SUPREME COURT OF INDIANA

MICHAEL G. TYSON,	)	FILED
	)	SEP 22 1993
Appellant,	)	DWAYNE BROWN
	)	CLERK OF THE
vs.	)	I N D I A N A
	)	SUPREME COURT
STATE OF INDIANA,	)	CAUSE NO.
	)	49A02-9203-
Appellee.	)	CR-129

O R D E R

Denying Appellant's Petition
to Transfer

Having closely reviewed the substantial record and pleadings in this cause, the Court is evenly divided as to the question of accepting or denying transfer in this cause. Under such circumstances, transfer "shall be deemed denied and the decision of the Court of Appeals shall be affirmed and becomes the law of the case." Ind. Appellate Rule 11(B)(5).

Accordingly, the Court DENIES "Appellant Michael G. Tyson's Petition

to Transfer."

The Clerk is directed to send copies of this order to all counsel of record.

DONE AT INDIANAPOLIS, INDIANA this 22 day of September, 1993.

Roger DeBruler
ACTING CHIEF JUSTICE

DeBruler, J. and Givan, J., vote to deny transfer.

Dickson, J. and Krahulik, J., vote to grant transfer.

Shepard, C.J., is not participating.

ATTORNEY FOR APPELLANT	ATTORNEYS FOR APPELLEE
Alan M. Dershowitz Cambridge, Massachusetts	Pamela Carter Attorney General of Indiana Lawrence M. Reuben Chief Deputy Attorney General Matthew R. Gutwein Deputy Attorney General Indianapolis, Indiana

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IN THE
SUPREME COURT OF INDIANA

MICHAEL G. TYSON,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 49A02-9203-CR-129
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION SUPERIOR COURT
Cause No. 49G04-9109-CF-116245
On Application of Michael G. Tyson

SHEPARD, Chief Justice.

Appellant Tyson has filed an application by his counsel Alan M. Dershowitz asking me to vacate my earlier disqualification and cast a vote now on the petition to transfer denied by this Court on September 22, 1993. I have considered same along with the other documents filed before me as follows:

1. Affidavits of Alan M. Dershowitz, Carolyn A. Cohen, and Stephen Joel Trachtenberg;

2. An acknowledgement of the Attorney General of Indiana;

3. Response by Alan M. Dershowitz;

4. A statement of additional authority filed by Alan M. Dershowitz; and

5. Various other letters of Dershowitz and the Attorney General.

In considering this application, I have reviewed the earlier decision I made not to participate in this appeal and believe it best to explain the reasons for that decision in acting on the

application by Mr. Dershowitz.

Of course, I participated in this case during an earlier stage of the proceedings. Indeed, I authored the Court's opinion on whether Mr. Tyson should be granted bail pending appeal. Tyson v. State (1992), Ind., 593 N.E.2d 175. As preparation of the record and briefing proceeded before the Indiana Court of Appeals during the summer of 1992, I fully expected to participate in whatever proceedings might eventually come before this Court.

On October 3, 1992, an event occurred which caused me to consider whether I should disqualify.

My wife, Amy W. MacDonell, accompanied me to New Haven, Connecticut, for the twentieth reunion of the Yale Law

School Class of 1972, held October 2-4, 1992. During this reunion, the school staged a large luncheon in the University Commons for people from all the classes then observing reunions. During the course of the lunch, my wife made a trip to the ladies' room. Upon her return, she told me that she had just introduced herself to Alan Dershowitz, by then counsel of record for Mr. Tyson. She said she had told Dershowitz that she had seen him argue the bail request before the Indiana Court of Appeals and that he needed to be better attuned to the Indiana way of approaching things as this appeal progressed. In particular, she said she told him his declaration that he would resign as counsel if Tyson skipped bail was not the right approach. The Dershowitz affidavit partly describes this conversation,

though it varies in several respects from my wife's description. Obviously, I based my decision on my wife's account, not having seen the Dershowitz version until last month. I think it unnecessary to make any findings of fact concerning the accuracy of the Dershowitz affidavit and can even assume it true for purposes of acting on the present application.

I agree with the suggestion of the Dershowitz affidavit that the conversation was improper. My wife is not a lawyer, and she did not fully appreciate the reasons why such conversations are considered improper. She now understands the principles underlying these rules. She regrets very much having initiated this colloquy and feels a deep sense of embarrassment about it. My own

decision not to disclose the reasons for my disqualification was motivated by a desire to protect my wife from the embarrassment she would feel about public disclosure and debate concerning her conduct, innocent as it was.

During October and early November 1992, I weighed the possibility of disqualifying. This is obviously an action which ought to be avoided if possible. A judge has a duty to hear and decide matters unless disqualification is required. Ind. Judicial Conduct Canon 3(B)(1).

In further assessing whether to recuse, two portions of the Indiana Code of Judicial Conduct came to mind. Canon 3(A)(4), as it then read, provided in part that a judge should "neither initiate nor consider ex parte or other

communications concerning a pending or impending proceeding." Jud. Canon 3(A)(4) reprinted in Indiana Rules of Court 698 (West 1992) (hereinafter 1992 Jud. Canon). Canon 3(C)(1) provided in part that a judge "should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Id. at 700. Both these provisions were taken from the model code of the American Bar Association.

The Canon on ex parte communications by its terms applied only to the judge, though it seems that in the minds of most, a communication from a judge's spouse about a case pending or impending would be fairly regarded as improper. Ex parte communications by their nature suggest partiality. See Jeffrey M. Shaman et al., Judicial Conduct and Ethics 149 (1990). In

Wells v. Del Norte Sch. Dist., 753 P.2d 770 (Colo. Ct. App. 1987), even an ex parte contact which involved no comment about the pending case was held to constitute such an appearance of impropriety "as to vitiate the proceedings." Id. at 772. It was plain that the circumstances which led to my considering recusal were not initiated by either of the parties to this litigation or by me, a fact which diminished its harm. Still, the communication did involve only one side to the litigation, and I concluded that its nature played a role in the second, and more complex question, namely, whether under Canon 3(C)(1) this was a case in which my impartiality might reasonably be questioned.

The test under Canon 3(C)(1) is whether an objective person, knowledgeable of

all the circumstances, would have a reasonable basis for doubting the judge's impartiality. Cf. Perkins v. Spivey, 911 F.2d 22 (8th Cir. 1990), cert. denied, 111 S.Ct. 1309 (1991). The question is not whether the judge's impartiality is impaired in fact, but whether there exists a reasonable basis for questioning a judge's impartiality. In Re Beard, 811 F.2d 818 (4th Cir. 1987). Concerns about public confidence in the judicial system underly Canon 3. See United States v. Hollister, 746 F.2d. 420 (8th Cir. 1984). A judge has a duty to promote public confidence in the impartiality of the judiciary. Ind. Judicial Conduct Canon 2.

Several factors weighed in favor of recusing on grounds relevant to Canon 3(C)(1). First, the conversation as

described in the Dershowitz affidavit and as related to me by my wife could fairly be described as one in which my wife undertook to advise Dershowitz about ways to improve his chances on appeal. Had I participated in the case and had I voted in favor of Tyson, many could have supposed that Dershowitz took my wife's advice and that my vote went with it. The harm flowing from such suspicions can easily be imagined by considering what the defense would have said had my wife advised the prosecution while the case was being appealed.

In addition, had I not recused and voted in favor of Tyson, it might have appeared that I favored Mr. Dershowitz's client so that Mr. Dershowitz would have no reason to reveal my wife's action. I would thus

have saved my wife the embarrassment of public disclosure and debate by voting for Tyson. Both of these suspicions, possibly arising out of my further participation in the Tyson appeal, would have reflected adversely on my impartiality as a judge and on the fairness of the Court on which I sit. Substantial concerns about fairness arise when a judge who arguably should disqualify remains as a voting participant. Failure to recuse under some circumstances would deny a party due process of law. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). Moreover, a judge who sits on a case notwithstanding legitimate grounds for recusal can damage public confidence in his impartiality for years to come. See, e.g., Larry Margasak, 100 Law Professors Question Rehnquist's 'Intellectual Honesty', AP, Sept. 10,

1986, available in LEXIS, Nexis Library, AP File.

Indian practice has always leaned toward recusal where reasonable questions about impartiality exists. In fact, Indiana departed from the ABA model code by omitting provisions for remittal of disqualification,[1] former Canon 3(D), believing that parties should not be permitted to waive grounds for recusal which the public might find warranted. All the facts and circumstances arguably presented a close case, and, in a close case where impartiality might reasonably be questioned, a judge must recuse. Hadler v. Union Bank & Trust Co., 765 F.Supp. 976 (S.D. Ind. 1991) (citing

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[1] Compare 1992 Ind. Jud. Canon 3(D) with Model Code of Judicial Conduct Canon 3(F) (Am. Bar Ass'n. 1990).

Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980)).

Thus, after several weeks of assessing these circumstances, I concluded that I should disqualify. I recognize that the circumstances which I weighed as pointing toward disqualification might be weighed differently by another judge or by me with somewhat different facts.

Having reached that decision, I confronted the question of when to do so. The custom in this Court is to disqualify when a case is fully submitted.

I elected to recuse in November 1992 for two reasons. First, I knew that one of the issues in the Tyson appeal would center on the application of rules announced in Wiseheart v. State,

491 N.E.2d 985 (Ind. 1986), an opinion I wrote for the Court. It seemed that I should let both parties to the Tyson appeal know early on that I would not be participating, such that they could brief the case armed with that knowledge and make whatever strategic decisions they thought warranted.

Second, I believed it was important to disqualify before the Court of Appeals ruled. A recusal announced after the Court of Appeals affirmed or reversed would undoubtedly have been regarded as partially motivated by its effect on that outcome. I believed it was important to make clear that my recusal was not outcome-driven.

While these considerations motivated my decision to disqualify in November 1992, there is an additional element

important to deciding the present application. Tyson's lawyers chose to seek the relief the day after the Court denied their petition to transfer, although Dershowitz appears to have understood the basis for my recusal well before that. Timeliness is important on recusal issues. "Counsel . . . may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits." Phillips v. Amoco Oil Co., 799 F.2d 1464 (11th Cir. 1986), cert. denied, 481 U.S. 1016 (1987).

Dershowitz asks me to vacate my 1992 disqualification and vote on Tyson's petition nunc pro tunc. Indiana authority has always regarded nunc pro tunc as a way of placing in the record something which occurred on a given day but was omitted. Taylor v. State

(1921), 191 Ind. 200, 132 N.E. 294. A court may not use a nunc pro tunc entry as a way to change a ruling it made, "however erroneous, or under whatever mistakes of law or facts such ruling may have been made." Harris v. Tomlinson (1892), 130 Ind. 426, 433, 30 N.E. 214, 216. Thus, the question arises, even if I now believe my earlier decision erroneous, whether it would be legal and proper to take the action Tyson seeks.

Dershowitz is correct that courts possess inherent authority to act notwithstanding their own rules. The Indiana Appellate Rules are but rules of procedure. This Court retains its constitutional authority to act notwithstanding those rules when the necessity arises. Troue v. Marker (1969), 253 Ind. 284, 252 N.E.2d 800.

Still, a court which acts outside its own rules does so at peril to public confidence. One need only change a few facts about this case to see the disadvantage. The Court of Appeals might have reversed Tyson's conviction and granted a new trial, and the four participating Justices divided equally. If the prosecution asked me later to come to its rescue by voting after the fact, one can assume that the defendant and his lawyers would have taken a dim view of that possibility.

Counsel for Tyson claims that this Court's denial of his petition to transfer by the vote of an equally divided Court denied his client due process of law. The Indiana Constitution prohibits appointing a substitute justice after a recusal, State ex rel. Mass Transp. Auth. v.

Indiana Revenue Bd. (1969), Ind., 254 N.E.2d 1, and thus there is the possibility from time to time of an equally divided court. The Supreme Court of the United States uses the same rule we use and occasionally an even number of participating Justices divide equally. See, e.g., United States v. France, 498 U.S. 335 (1991) (Justice Souter not participating); Wyoming v. United States, 492 U.S. 406 (1989) (Justice O'Connor not participating); California v. United States, 490 U.S. 920 (1989) (Justice Marshall not participating). This has sometimes happened in cases of substantial importance. See, e.g., State ex rel MTA v. Indiana Revenue Bd. (1969), 251 Ind. 607, 244 N.E.2d 111.

With the benefit of a year's reflection and having reconsidered the matter now,

I conclude that my decision to recuse in November 1992 was the proper ethical course. I also conclude that altering that decision now after the case has been resolved through final order would damage this Court's effort to provide a level playing field.

Accordingly, the application is denied. I direct the Clerk to open the sealed material tendered by the parties and place it in the case file.

Indiana Code §35-37-4-4, the "Rape Shield Law," provides:

Sec. 4. (a) In a prosecution for a sex crime as defined in IC 35-42-4:

(1) evidence of the victim's past sexual conduct;
(2) evidence of the past sexual conduct of a witness other than the accused;
(3) opinion evidence of the victim's past sexual conduct;
(4) opinion evidence of the past sexual conduct of a witness other than the accused;
(5) reputation evidence of the victim's past sexual conduct; and
(6) reputation evidence of the past sexual conduct of a witness other than the accused;

may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

(b) Notwithstanding subsection (a), evidence:
(1) of the victim's or a witness's past sexual conduct with the defendant;
(2) which in a specific instance of sexual activity shows that some person other than the defendant committed

the act upon which the prosecution is founded; or

(3) that the victim's pregnancy at the time of trial was not caused by the defendant:

may be introduced if the judge finds, under the procedure provided in subsection (c) of this section, that it is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(c) If the defendant or the state proposes to offer evidence described in subsection (b) of this section, the following procedure must be followed:

(1) The defendant or the state shall file a written motion not less than ten (10) days before trial stating that it has an offer of proof concerning evidence described in subsection (b) and its relevancy to the case. This motion shall be accompanied by an affidavit in which the offer of proof is stated.

(2) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, and at the

hearing allow the questioning of the victim or witness regarding the offer of proof made by the defendant or the state.

At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant or the state regarding the sexual conduct of the victim or witness is admissible under subsection (b) of this section, the court shall make an order stating what evidence may be introduced by the defendant or the state and the nature of the questions to be permitted. The defendant or the state may then offer evidence under the order of the court.

(d) If new information is discovered within ten (10) days before trial or during the course of the trial that might make evidence described in subsection (b) of this chapter admissible, the judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under this chapter.

(e) This section does not limit the right of either the state or the accused to impeach credibility by a showing of prior felony convictions.

(f) If:

(1) a defendant files a motion under subsection (c)(1) concerning evidence described in subsection (b)(3); and

(2) the state acknowledges that the victim's pregnancy is not due to the conduct of the defendant;

the court should instruct the jury that the victim's pregnancy is not due to the conduct of the defendant. However, other evidence concerning the pregnancy may not be admitted, and further reference to the pregnancy may not be made in the presence of the jury.